CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 158.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED, PLAINTIFF IN ERROR,

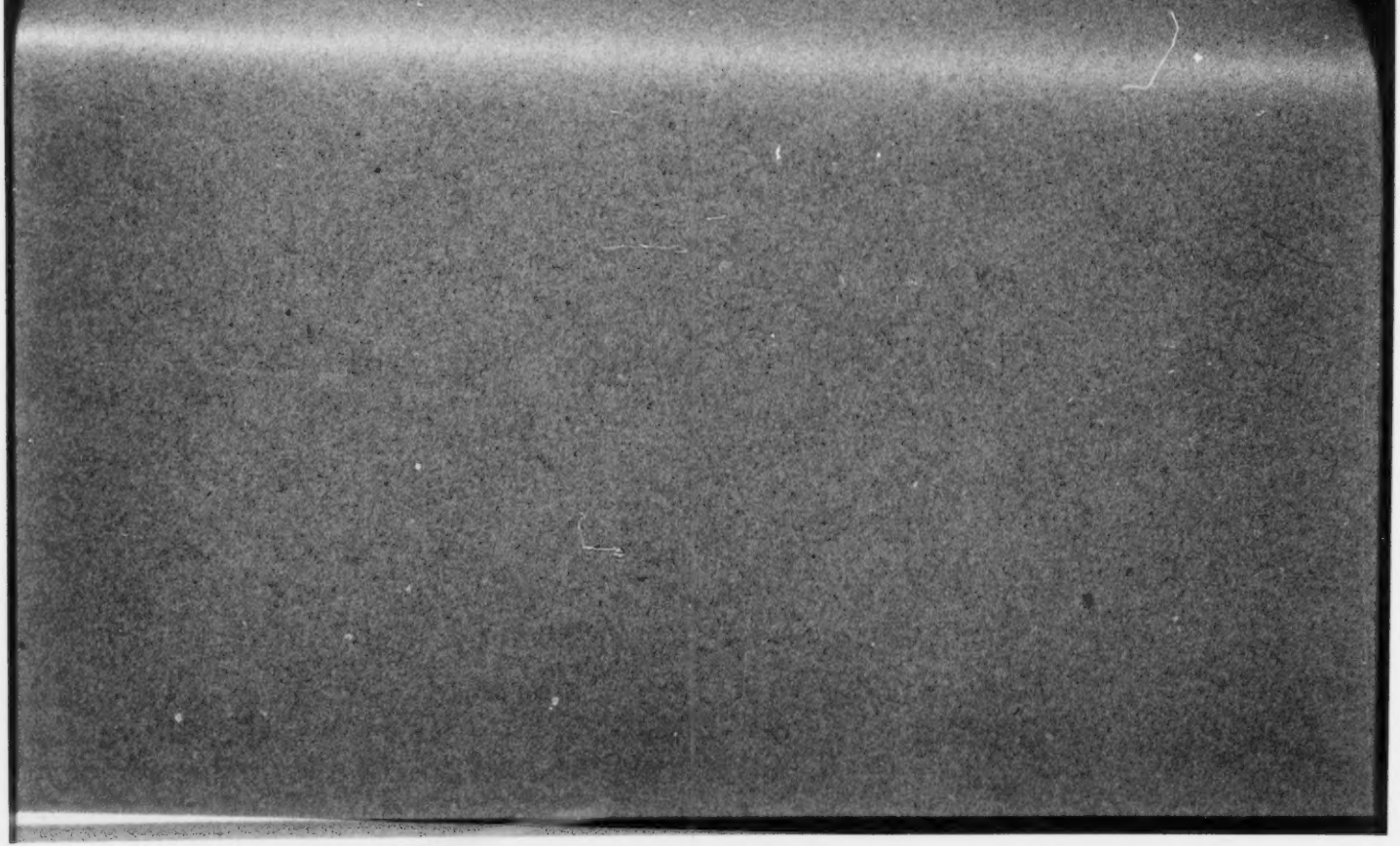
vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED AUGUST 28, 1901.

(18,256.)



(18,256.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 403.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

INDEX.

	Original.	Print.
Caption	a	1
Docket entries	a	1
Transcript from circuit court of Elmore county	1	1
Appeal bond	2	1
Verdict	3	2
Complaint	4	2
Continuance	5	3
Demurrer to complaint	6	4
Pleas	8	5
Demurrer to pleas	11	7
Verdict	12	8
Judgment	12	8
Bill of exceptions	13	9
Statement as to Exhibit A	13	9
Agreed statement of facts	13	10
Plaintiff's requests to charge (given)	14	10
Defendant's requests to charge (refused)	14	10
Judge's certificate to bill of exceptions	15	10
Exhibit A—Complaint	16	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1901.

	Original.	Print
Appeal bond	17	12
Citation	18	13
Clerk's certificate	19	14
Assignment of errors	20	14
Argument and submission	21	15
Judgment	21	15
Bond on writ of error	22	15
Clerk's certificate	23	16
Petition for writ of error	24	17
Assignment of errors	25	17
Writ of error	26	18
Order staying proceedings	27	19
Citation and service	28	19

a (Filing.)

5 Div., 51. Supreme Court of Alabama.

Filed Mar. 27, 1901. Rob't F. Ligon, Jr., Clerk.

LOUISA V. KIDD, Ex'tr'x,
vs.
THE STATE OF ALABAMA.

Appeal from Elmore county circuit court.

Apr. 9, 1901.—Argued and submitted with No. 50.
June 29, 1901.—The judgment is affirmed on authority of The State *vs.* Kidd and The State *vs.* Kidd, executrix, 125 Ala. 413.

TYSON, *J.*

1 THE STATE OF ALABAMA,
Elmore County.

Be it remembered, that at a term of the circuit court of Elmore county, in the State of Alabama, begun and held for the aforesaid county at the court-house thereof, in the city of Wetumpka and county of Elmore, on Monday the 29th day of October A. D. 1900, it being the first day of said term. Present and presiding, the Hon. N. D. Denson, judge of the 5th judicial circuit, and one of the circuit judges of the State of Alabama. Proceedings were had and orders were made as follows to wit:

2 *Appeal Bond to the Circuit Court.*

THE STATE OF ALABAMA,
Elmore County.

Whereas, at the April term 1899 of the court of county commissioners for the county of Elmore, there came on to be heard the matter of the assessment of excaped taxes against L. A. Bates as executor and Louisa V. Kidd as executrix of the last will and testament of H. B. Tulane deceased for the years 1893 to 1897 inclusive, which was pleaded to and defended by Louisa V. Kidd as sole acting executrix, and whereas, upon such hearing the said Louisa V. Kidd as executrix as aforesaid was found liable and adjudged to be liable for, and adjudged to pay excaped taxes for the years aforesaid in the aggregate amount of $6,325.00 and whereas, the said Louisa V. Kidd as executrix has prayed an appeal from such decree and order to the next term of the circuit court of Elmore county and the same has been allowed upon the appellant entering into bond of thirteen thousand dollars ($13,000.00) the same being double the amount of the said tax and the probable cost, conditioned to prosecute such appeal to effect and pay such judgment as the court may render:

Now therefore know all men by these presents: that we the said Louisa V. Kidd as executrix aforesaid and individually as princi-

pal, and the United States Fidelity and Guaranty Co., a corporation duly incorporated under the laws of the State of Maryland, as surety, are held and firmly bound unto the State of Alabama and to such person or officer to whom such bond should be made payable in the penal sum of thirteen thousand dollars, which sum well and truly to be paid in lawful money of the United States we hereby bind ourselves, jointly and severally firmly by these presents.

Sealed with our seals this the 7th day of April 1899. The condition of the above obligation is such that if the said Louisa V. Kidd as executrix as aforesaid shall prosecute her aforesaid appeal to effect or in the event she shall fail in prosecuting her said appeal to effect, she shall pay such judgment as may be rendered against her then or in either of said events this obligation is to be null and void otherwise to be and remain in full force and effect.

{ The United States Fidelity & Guaranty } { Company, Incorporated 1896. }

LOUISA V. KIDD.
LOUISA V. KIDD,
As Executrix of the Will of H. B. Tulane, Dec'd.
THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. R. McMASTER, *Ag't, and*
By T. SCOTT SAYRE, *Att'y.*

Attest: F. W. LULL.

Filed and approved April 10th, 1899.

H. J. LANCASTER,
Principal Judge, Court of County Com's, Elmore Co., Ala.

3 We the jury find the issue in favor of the defendant.

J. M. HARRIS, *Foreman.*

May 5th, 1899.

4 *Complaint.*

EXHIBIT "A" TO BILL OF EXCEPTIONS.

THE STATE OF ALABAMA, }
Elmore County. }

To the honorable commissioners' court of said county:

I hereby report in writing that I have assessed escaped taxes against Louisa V. Kidd executrix, and L. A. Bates executor of the estate of H. B. Tulane deceased on the following-described property namely:

Stocks and bonds, money, money hoarded or on deposit subject to check draft or order, or in safety-deposit box, safe or vault, and elsewhere, moneyed capital, money lent, solvent credits and credits of value in the aggregate of the value of the sum of $200,000.00

That I have valued said property at $200,000.00

That for the year 1893 the taxes due on said property were to the State $900.00; special $100.00; county $1,000.00; total $2,000.00

That for the year 1894 the taxes due on said property were to the State $900.00; special $100.00; county $1,000.00; total $2,000.00
That for the year 1895 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00
That for the year 1896 the taxes due on said property were to the State $1,100.00; special $100.00; county $800.00; total $2,000.00
That for the year 1897 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00
That for the year 1898 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00
That the fees of tax commissioner 10 per cent. on the escaped taxes for the years from October 1, 1895 to October 1, 1896, October 1, 1896, to October 1, 1897 and October 1, 1897 to October 1, 1898 are $620.00 ($620.00) and the fees of the assessor are $3.00. Total costs $623.00
That the total amount of taxes from said estate State and county is $12,300.00, which added to the costs is $12,923.00
I append said assessment to this report.

J. I. PLOTT,
Tax Assessor.

5 1899. *Returned List.* 1899.

Elmore county, Ala., precinct No. 18. List of property and assessment *vs.* Louisa V. Kid, executrix, & L. A. Bates, executor, of the estate of H. B. Tulane, deceased, for yr. 1893, 1894, 1895, 1896, 1897, and 1898.

List of property returned for taxation by Louisa V. Kidd, ext., & L. A. Bates, ex't'r, est. H. B. Tulane.

Beat No. 8 to J. I. Plott, tax assessor of Elmore county, Ala., for the year 1899.

Stocks bonds money money hoarded or on deposit subject — draft or *or* order, or in safety-deposit box, safe or vault, & elsewhere.
Money capital, money lent, solvent credits & credits of value in the aggregate of the value of $200,000 for the yrs. 1893 1894 1895 & 1896 & 1897 1898.
Subscribed to before me this the 16 day of Dec. 1898.

J. I. PLOTT,
Tax Assessor.

Endorsement: Received and filed Dec. 16th 1898. W. P. Gaddis, judge of probate principal judge of the commissioners' court.

Continuance.

Fall Term, 1899, November 2d, 1899.

THE STATE OF ALABAMA
vs.
LOUISA V. KIDD, Ex'x. } 2225.

Continued—pending in supreme court.

6 *Demurrers of Defendant.*

In the Circuit Court of Elmore County, Ala.

THE STATE OF ALABAMA
v.
LOUISA V. KIDD, as Executrix of the Will of Horatio B. Tulane, Deceased.

Comes the defendant and demurs to the complaint or petition filed in this cause and for grounds of demurrer assigns the following:

1st.

Said complaint shows no valid assessment of property.

2nd.

Said complaint fails to allege any notice to this defendant by the tax assessor or by the tax commissioner of said assessment.

3rd.

It is not shown by said complaint that said assessment was ever entered on any book of assessment.

5th.

It is not alleged in the complaint that said assessment was ever entered under the head, "Commissioners' assessment of escaped taxes."

6th.

Said complaint shows affirmatively that said assessment was illegal in that several distinct kinds of property which under the law should have been valued separately were valued together as a whole.

7th.

Said complaint shows that the amount of tax was not extended in the assessment as required by law, so as to show the tax against each piece of property.

8th.

Said complaint shows that the property assessed was not described with the accuracy required by law.

9th.

Said complaint fails to show that the property assessed was of a character taxable under the laws of the State of Alabama.

10th.

Said complaint shows that the only assessment ever entered of said property was entered on assessment blanks of the character used in giving in taxes.

7 11th.

Said complaint fails to show that said assessment was made by or under the direction of any tax commissioner.

GUNTER & GUNTER,
J. M. CHILTON,
For Defendant.

Filed Nov. 2 1900.
L. C. SMITH, *Clerk.*

8 *Defendant's Pleas.*

In the Circuit Court of Elmore County, Ala.

STATE OF ALABAMA
v.
LOUISA V. KIDD, Ex'tr'x of the Last Will & Testament of Horatio B. Tulane, Deceased.

Comes the said defendant by her attorney, and for answer to the complaint in said cause, pleads as follows:—

1. That her said testator in his lifetime, and she as his executrix after his death, which occurred in Oct., 1897, regularly gave in for assessment for each of the years for which taxes are now claimed in said complaint all of the property belonging to the said Tulane during his life and to his estate after his death, in the State of Alabama which was taxed by the laws of Alabama, except the shares of the capital stock of railroads owned by said Tulane in his lifetime, and belonging to his estate after his death, which said railroads were and are corporations created by and located in other States than the State of Alabama, and which did not extend into Alabama, and which did no business in Alabama during any of said years. And that taxes were duly assessed against the property so given in and paid by said Tulane in his lifetime and by defendant since his death. And defendant says that all of said taxes now claimed of her are for and on account of said shares in said railroads so owned by said Tulane in his lifetime and by his estate after his death and not given in for assessment. That said Tulane was, during his life, a resident and citizen of the State of Alabama, and that defendant is also a resident and citizen of said State.

Defendant says that if the laws of Alabama impose the taxes

claimed in this suit upon said shares of said railroad companies, the same are illegal and void and violative of the Constitution of the United States and the XIV amendment thereof, in that there is no similar tax imposed by said laws upon the shares of domestic railroads or upon the shares of foreign railroads companies doing business in the State of Alabama. And defendant claims the benefit of the protection of the Constitution of the United States against the collection of the taxes claimed in this suit.

2. And for further plea in this behalf, defendant avers all of the facts stated in the foregoing plea No. 1, and says if the laws of Alabama impose the taxes claimed in this suit upon the said shares of the said railroad companies, the same are illegal and void
9 and violative of the constitution of the State of Alabama, in that there is no similar tax imposed by said laws upon the shares of domestic railroads or of foreign railroad companies doing business in the State of Alabama. And defendant claims the benefit and protection of the constitution of Alabama against the collection of the taxes claimed in this suit.

3. And for further plea in this behalf, defendant says that the claim for taxes for which this suit is brought is in large part for taxes on shares in the capital stock of foreign corporations owned by said Tulane in his lifetime, and by his estate after his death, and which said corporations were not located in Alabama and did no business in Alabama, and the shares in which were not subject to taxation for the years for which taxes are claimed in said complaint, because no similar taxes are imposed upon the shares of like domestic corporations and foreign corporations doing business in the State of Alabama. And so defendant pleads against the collection of the taxes assessed against her on said shares of foreign corporations, that the laws imposing the same are illegal and void under the Constitution of the United States and the XIV amendment thereof. And as to other taxes claimed of her in said complaint, she denies each and every allegation of the complaint respecting the same.

4. And for further plea in this behalf, defendant says that as to so much of said complaint as seeks to recover taxes on said capital stock described in pleas No. 1, 2 and 3, for the year 1898, that the said Tulane died on the 10th of October, 1897, and said taxes were assessed against this defendant as executrix of his last will. That the said Tulane was at the time of his death, a resident citizen of the State of Alabama, and his will was probated in the probate court of Elmore county, in said State, having jurisdiction thereof. That the said stocks were, at the time of the death of said Tulane, and up to the time of the institution of this suit, physically on deposit in the city of New York, State of New York, and subject to the administration in that State, and have never been in the possession or control of defendant, she not having qualified as executrix in that State. And as to so much of said complaint as seeks to recover other taxes of this defendant, she denies each and every allegation of the complaint.

5. And for further plea in this behalf, defendant avers that the

taxes claimed against her in this suit are for escaped taxes alleged to have been assessed under an act of the legislature of the
10 State of Alabama, approved the 3 day of February 1897, entitled An act to provide for the *the* more efficient assessment and collection of taxes in the State of Alabama. And this defendant avers that no notice of any assessment was given her before said assessment was entered of record.

6. And for further plea in this behalf, the defendant says that the taxes claimed of her in this suit are for escaped taxes alleged to *to* be owing on the property of H. B. Tulane, deceased, and assessed under the act of the legislature set forth in ple- No. 5, and this defendant says that no assessment of said property was ever entered of record in the assessor's record of taxes escaped.

7. And for further plea in this behalf, this defendant denies all the statements contained in said complaint against her, except that she is the executrix of the last will of H. B. Tulane, deceased.

GUNTER & GUNTER,
J. M. CHILTON,
For Defendant.

Endorsement: Filed Nov'r 2d 1900. L. C. Smith clerk.

11 *Demurrer to Defendant's Plea.*

In the Circuit Court of Elmore County.

STATE OF ALABAMA
vs.
LOUISA V. KIDD, as Ex'r'x. } 2225.

And now comes the plaintiff and demurs to the pleas numbered 1, 2, 3 and 4, filed by the defendant, and, for grounds of demurrer assigns the following.

1st. That said pleas show on their faces that the property assessed by the tax assessor of Elmore county, which assessment is the basis of this suit was subject to taxation in the county of Elmore, State of Alabama for the years for which said assessments were made.

2. That said pleas fail to aver any facts, which show or tend to show, that the situs of the property assessed for taxation by the tax assessor of Elmore county, which assessment is the basis of this suit was not during the years set out in such assessment in the county of Elmore, State of Alabama for the purposes of taxation.

3d. That facts, if they be facts, that the property assessed in said assessment was not actually within the State of Alabama and Elmore county during the years covered by said assessment but was kept without the State, and consisted of stocks and bonds in foreign corporations doing no business in the State of Alabama, affords no defense to the claim for taxes thereon, made in this suit.

4th. That the said pleas show that the said H. B. Tulane in his lifetime was the owner of all the personal property assessed in the assessment, which is the basis of this suit, for the years stated in the assessment, and that after his death, the said property belonged to

the estate of said Tulane of which the defendant is executrix, which estate is being administered in the courts of Elmore county, Alabama, of which county said Tulane was a resident at the time of his death, and during the years for which said assessment was made.

GORDON MACDONALD,
PARKER & GOLSON,
Att'ys for Pl'ff.
GORDON MACDONALD,
PARKER & GOLSON,
Att'ys for Pl'ff.

Endorsements: Filed Nov'r 2d 1900. L. C. Smith clerk.

12 *Verdict.*

No. 2225.

We the jury find for plaintiff and assess the damages at $5,900.00.

N. McINISH, *Foreman.*

Judgment.

STATE OF ALABAMA
vs.
LOUISA V. KIDD, Ex'x, &c. } 2225.

NOVEMBER 2D, 1900.

This day came the parties by attorneys, and by consent the pleas of defendant heretofore filed, are withdrawn, and defendant demurs to the complaint as shown by the record, and from demurrers on file, which demurrer being understood by the court,

It is considered and adjudged by the court that the demurrer be and is hereby overruled and held for naught. Thereupon the defendant filed sundry pleas. Plaintiff demurs to pleas 1, 2, 3 & 4, which demurrer is shown by the record, and being considered by the court, it is adjudged that said demurrer is sustained, whereupon issue is joined between the parties on the plea of general issue, and thereupon came a jury of good and lawful men to wit: Nevin McInish and eleven others who being sworn and empaneled as required by law, upon their oaths do say, "We the jury find for the plaintiff, and assess the damages at five thousand and nine hundred dollars." It is therefore adjudged by the court that the plaintiff recover of the defendant the sum of five thousand and nine hundred dollars, for which execution may issue to be levied of the goods and chattels, lands and tenements of the estate of H. B. Tulane dec'd. Defendant has 60 days to present bill of exceptions.

13 *Bill of Exceptions.*

In the Circuit Court of Elmore County, Fall Term, 1900.

STATE OF ALABAMA
v.
LOUISA V. KIDD, as Executrix.

Be it remembered that this cause coming on to be heard, the following proceedings were had. The plaintiff offered in evidence the assessment made by the tax assessor against the defendant, which is admitted by the parties as having been made on information furnished by the back-tax commissioner, after regular assessments on the other property, not set out in the agreement of facts below, of the defendant were made and taxes paid. Said paper was offered as the assessment of the tax assessor. The original of said paper is hereto attached as part of this bill of exceptions, marked "Exhibit A." And said paper is the paper used by the plaintiff as and for the declaration on the trial of this cause, and is the declaration or complaint referred to in the pleas of the defendant and proceedings in the cause.

The grounds of objection were: First, that it is not shown that the law was complied with in the way of notice to defendant and entry of assessment. Second, the assessment is not *prima facie* evidence of the liability claimed against defendant in this suit. The court overruled the objections, and the defendant excepted.

The plaintiff thereupon offered in evidence the following agreed statement of facts:

In the Circuit Court of Elmore Co.

STATE OF ALABAMA
v.
LOUISA V. KIDD, as Ex. } No. 2225.

Facts Admitted.

For the years for which taxes are claimed, the testator up to his death, in Oct., 1897, and his estate for the year 1898, had in the following corporations the amounts of stock of the value stated—each of said corporations were corporations of other States than Alabama, and during the years for which taxes are claimed, did no business in Alabama, and had no property therein, and gave in no property for taxation.

1. United N. J. R. R. & C. Co.,	$25,000,	val.....	$60,000
2. Morris & Essex R. R. Co.,	15,000,	"	22,500
3. Pen. Coal Company,	5,000,	"	15,000
4. Illinois Cen. R. R. Co.,	10,000,	"	10,000

That said corporations are all railroad companies.

14 (For'd).....	$107,500

The said Tulane and his estate also owned the following bonds—of the value stated:

1. Bonds of Tenn. Coal & Iron Co., $5,000, val.....	4,000
2. Bonds of the State of Alabama, $10,000, not assessable, value.....	10,000
	$121,000
Deduct Alabama bonds.....	10,000
	$111,000

And it is admitted that for the years for which taxes are claimed, none of the said stocks or bonds were given in or assessed for taxation in Alabama.

It is admitted that testator resided in Alabama, and in Elmore county, until Oct., 1897; that he then died, and his will was probated in said county, and defendant qualified as executrix in said State.

That said bonds and stocks were on deposit in the State of New York until after this suit was instituted, and were subject to administration and taxation in New York and that defendant never qualified as executor in New York, or received said bonds and stocks until the year 1900.

It is further admitted that when the assessment was made, the same was filed in the commissioners' court of Elmore county, and notice issued to defendant, and she appeared and defended against the same, and judgment going against her, she appealed to this court.

Nov. 2, 1900.

GORDON MACDONALD,
PARKER & GOLSON,
Att'ys for Pl'ff.
GUNTER & GUNTER,
J. M. CHILTON,
For Defendant.

This was all the evidence in the case, and thereupon, the plaintiff asked the court to give the following written charge to the jury: "If the jury believe the evidence in this cause, they will find for the plaintiff," which charge the judge gave to the jury, and to the giving of the same, the defendant excepted. And thereupon the defendant asked the court to give the following charge to the jury, which is in writing: "If the jury believe the evidence they will find for the defendant as to the claim for taxes on shares of foreign rail-
road companies," which charge the court refused, and to
15 which refusal the defendant duly excepted.

And this is duly signed and sealed as the defendant's bill of exceptions in this cause, this, the 12 day of Dec. 1900, within the

period allowed by the order of the court for the signing of the bill of exceptions in said cause.

N. D. DENSON,
Judge Presiding.

16 EXHIBIT A TO BILL OF EXCEPTIONS.

THE STATE OF ALABAMA, }
Elmore County. }

To the honorable commissioners' court of said county:

I hereby report in writing that I have assessed escaped taxes against Louisa V. Kidd executrix and L. A. Bates executor of the estate of H. B. Tulane deceased, on the following-described property, namely: stocks and bonds, money, money hoarded or on deposit subject to check draft or order, or in safety-deposit box, safe or vault, and elsewhere, moneyed capital, money lent, solvent credits and credits of value: in the aggregate of the value of the sum of $200,000.00 That I have valued said property at $200,000.00 That for the year 1893 the taxes due on said property were to the State $900.00; special $100.00: county $1,000.00; total $2,000.00 That for the year 1894 the taxes due on said property were to the State $900.00; special $100.00; county $1,000.00; total $2,000.00 That for the year 1895 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00; That for the year 1896 the taxes due on said property were to the State $1,100.00; special $100.00; county $800.00; total $2,000.00 That for the year 1897 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00 That for the year 1898 the taxes due on said property were to the State $1,100.00; special $100.00; county $900.00; total $2,100.00

That the fees of tax commissioner 10 % on the escaped taxes for the years from October 1, 1895 to October 1, 1896, October 1, 1896 to October 1, 1897 and October 1, 1897 to October 1, 1898 are $620.00 ($620.00) and the fees of the assessor are $3.00—total costs $623.00 That the total amount of taxes from said estate State and county is $12,300.00, which added to the costs is $12,923.00

I append said assessment to this report.

J. I. PLOTT,
Tax Assessor.

1899. *Returned List.* 1899.

Elmore county, Ala., precinct No. 18. List of property and assessment *vs.* Louisa V. Kid, executrix, & L. A. Bates, executor, of the estate of H. B. Tulane, deceased, for yr.- 1893, 1894, 1895, 1896, 1897, & 1898.

17 List of property returned for taxation by Louisa V. Kidd, ext., & L. A. Bates, extr., est. H. B. Tulane, best No. 8, to J. I. Plott, tax assessor of Elmore county, Ala., for the year 1899.

Stocks bonds money money hoarded or on deposit subject draft or order, or in safety-deposit box, safe or vault, & elsewhere. Money capital, money lent, solvent credits & credits of value in the aggregate of the value of $200,000 for the yrs. of 1893 1894 1895 & 1896 & 1897 — 1898.

Subscribed to before me this the 16 day of Dec. 1898.

J. I. PLOTT,
Tax Assessor.

Endorsement: Received and filed Dec. 16th 1898. W. P. Gaddis, judge of probate. Principal judge of the commissioners' court. The within bill of exceptions is correct. Gordon Macdonald, att'y for State of Alabama. Filed in office Dec. 22nd 1900. L. C. Smith, clerk.

Appeal Bond to Supreme Court.

Circuit Court.

No. 2225.

THE STATE OF ALABAMA, }
Elmore County. }

Know all men by these presents, that we, Louisa V. Kidd, executrix of the will of H. B. Tulane dec'd and Louisa V. Kidd individually Fannie L. Moragne, M. K. Dunlap and J. D. Dunlap are held and firmly bound unto the State of Alabama in the sum of thirteen thousand dollars for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Sealed with our seals, and dated this, the 14 day of December 1900.

Whereas, at the fall term 1900, of the circuit court of and for said county on, to wit: the 2nd day of November 1900, the said State of Alabama recovered a judgment in said court against L. V. Kidd ex'tr'x est. of H. B. Tulane deceased for the sum of five thousand nine hundred dollars, debt and damages, and the further sum of — dollars, the cost in that behalf expended; and whereas, on
18 this day, the said L. V. Kidd ex'tr'x est. of H. B. Tulane as such defendant, has made application for an appeal from said

judgment to the next term of the supreme court, to be holden of and for said State, to reverse said judgment, and also for a supersedeas of the execution of said judgment, which has been granted on entering into this bond.

Now therefore, the condition of the foregoing obligation is such, that if the said L. V. Kidd ex'tr'x est. of H. B. Tulane shall prosecute her said appeal to effect, and satisfy such judgment as the supreme court may render in this case, then the said obligation to be null and void, otherwise to remain in full force and effect.

And we, and each of us, hereby waive all rights of claim of exemption we or either of us have now or may hereafter have, under the constitution and laws of Alabama, and we hereby severally certify that we have property free from all encumbrance, to the full amount of the above bond.

LOUISA V. KIDD. [L. S.]
FANNIE L. MORAGNE. [L. S.]
MYRTLE K. DUNLAP. [L. S.]
J. D. DUNLAP. [L. S.]

Approved:
Dec. 21st 1900.
L. C. SMITH, *Clerk.*

Filed this 21st day of Dec. 1900.
L. C. SMITH, *Clerk.*

Citation of Appeal to Supreme Court.

Circuit Court, Fall Term, 1900.

No. 2225.

THE STATE OF ALABAMA, }
Elmore County. }

To the State of Alabama or its attorneys of record, Gordon McDonald, H. R. Golson, & Jno. H. Parker, Greeting:

Whereas, Louisa V. Kidd executrix of the will of H. B. Tulane deceased, has taken an appeal from the judgment of the circuit court of said county in the cause of the State of Alabama against Louisa V. Kidd executrix of the will of H. B. Tulane deceased,

Now, you are, therefore, cited to appear at the present term 1900, of the supreme court of Alabama, to defend on said appeal, if you shall think proper so to do.

Witness my hand, this 27th day of Dec. 1900.

L. C. SMITH, *Clerk.*

19 Endorsements: Service of the within citation and notice of appeal is hereby accepted, and notice and personal service by sheriff is waived. H. R. Golson, one of the attorneys for the State of Alabama. Dec. 27, 1900. Filed Dec. 27th, 1900. L. C. Smith, clerk.

Certificate of Appeal to Supreme Court.

Circuit Court, Fall Term, 1900.

No. 2225.

THE STATE OF ALABAMA, }
Elmore County. }

I, L. C. Smith, clerk of the circuit court of said county, hereby certify that the foregoing pages, from 1 to 14 inclusive, contain a full and complete transcript of the record and proceedings of the said circuit court in a cause therein pending wherein The State of Alabama is plaintiff, and Louisa V. Kidd executrix is defendant; that the said Louisa V. Kidd did on the 21st day of December, 1900, after giving security for cost, obtain an appeal to the present term, 1900 of the supreme court of Alabama, and that Louisa V. Kidd, Fannie L. Moragne, Myrtle K. Dunlap and J. D. Dunlap are the sureties for said costs; all of which I hereby certify to said supreme court.

Witness my hand, this the 28th day of December, 1900.

L. C. SMITH, *Clerk.*

20 *Assignment of Errors.*

Comes the appellant by attorney and says that in the record & proceedings of the lower court manifest error hath intervened to her detriment, as follows:

1. The lower court erred in overruling the demurrer to the complaint.
2. The lower court erred in sustaining plaintiff's demurrer to defendant's plea No. 1.
3. The lower court erred in sustaining plaintiff's demurrer to defendant's plea No. 2.
4. The lower court erred in sustaining plaintiff's demurrer to defendant's plea No. 3.
5. The lower court erred in sustaining plaintiff's demurrer to defendant's plea No. 4.
6. The lower court erred in giving to the jury the instruction to find for the plaintiff if they believed the evidence.
7. The lower court erred in refusing to give to the jury the written instruction in these words: "If the jury believe the evidence they will find for the defendant as to the claim for taxes on shares of foreign railroad companies."

GUNTER & GUNTER,
J. M. CHILTON,
For Appellant.

21 *Orders of Supreme Court.*

Supreme Court of Alabama, Tuesday, April 9th, 1901. (Min. 52, p. 206.)

5 Div., 51.

LOUISA V. KIDD, Ex'tr'x, &c.,
v.
THE STATE OF ALABAMA.

Appeal from Elmore circuit court.

Come the parties by attorneys, and argue and submit this cause for decision.

Supreme Court of Alabama, Saturday, June 29th, 1901. (Min. 52, p. 335.)

5 Div., 51.

LOUISA V. KIDD, Ex'tr'x, &c.,
v.
THE STATE OF ALABAMA.

Appeal from Elmore circuit court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted, and duly examined and understood by the court, it is considered that in the record and proceedings of the circuit court there is no error. It is therefore considered that the judgment of the circuit court be in all things affirmed. It is also considered that the appellant, and Fannie L. Moragne, Myrtle K. Dunlap and J. D. Dunlap, sureties on the appeal bond, pay the amount of the judgment of the circuit court and ten per centum damages thereon and interest, the costs of appeal of this court and of the circuit court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let execution issue accordingly.

22 (Filing.)

5 Div., 51. Supreme Court of Alabama.

Filed Aug. 6, 1901. Rob't F. Ligon, Jr., Clerk.

Supreme Court of Alabama.

THE STATE OF ALABAMA, Plaintiff,
v.
LOUISA V. KIDD, as Ex'r'x, etc., Defendant. } No. —.

Know all men by these presents, that we, Louisa V. Kidd as executrix of the last will of H. B. Tulane, dec'd, as principal, and the

American Bonding & Trust Company, surety, are held and firmly bound unto The State of Alabama, plaintiff above named, in the sum of $12,000 to be paid to the said State of Alabama, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 6 day of August 1901.

Whereas, the above-named defendant, Louisa V. Kidd, as executrix of the will of H. B. Tulane deceased, has sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above-entitled cause by the supreme court of Alabama.

Now, therefore, the condition of this obligation is such, that if the above-named Louisa V. Kidd as executrix of the will of H. B. Tulane, deceased, shall prosecute said writ of error to effect and answer all costs and damages, if she shall fail to make good her plea, then this obligation to be void, otherwise to remain in full force and virtue.

LOUISA V. KIDD, *As Ex. of H. B. Tulane,*
By W. A. GUNTER.
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By GASTON GUNTER, *Vice-Pres't.*

Attest: CHARLES P. GUNTER, *Ass't Sec'y.*

App'd
T. N. M.

Approved Aug. 6 1901.
THOS. N. McCLELLAN,
Chief Justice, etc.

{Seal The American Bonding & Trust Co. of Baltimore City, Incorporated 1894.}

23 THE STATE OF ALABAMA, }
Judicial Department. }

The Supreme Court of Alabama, November Term, 1900, 5 Div., 51.

LOUISA V. KIDD, Ex'tr'x, Appellant, }
v. }
THE STATE OF ALABAMA. }

From Elmore circuit court.

THE STATE OF ALABAMA, }
City and County of Montgomery. }

I, Robert F. Ligon, Jr., clerk of the supreme court of Alabama, do hereby certify that the foregoing pages numbered from 1 to 22 inclusive, contain a full, true and correct copy of the record and proceedings of the lower court, and of the orders and judgment entry of the supreme court of the State of Alabama together with a copy

of the supersedeas and appeal bond in the above-stated cause, as the same appear and remain of record in this office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Alabama, at the capitol, this, 10th day of August, 1901.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of the State of Alabama.

24 Supreme Court of Alabama, 5 Div., 51.

LOUISA V. KIDD, Appellant,
v.
STATE OF ALABAMA, Appellee.

Louisa V. Kidd, as executrix of the will of H. B. Tulane, defendant in the above-entitled cause, feeling herself aggrieved by the judgment entered on the 29th day of June, 1901, comes now by W. A. Gunter, her attorney, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, for that she says that in said cause there was drawn in question the validity of a statute of the State of Alabama on the ground of its being repugnant to the Constitution of the United States as denying to defendant the equal protection of the laws; and also petitions that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed, until the determination of said writ of error by the Supreme Court of the United States.

And petitioner will ever pray.

W. A. GUNTER,
Att'y for Defendant.

25 The Supreme Court of the United States, October Term, 1901.

LOUISA V. KIDD, as Executrix of the Will of H. B. Tulane, Deceased, Pl't'ff in Error,
v.
STATE OF ALABAMA, Def't in Error.

Comes the plaintiff in error and files the following assignments of error, upon which she will rely in the prosecution of her writ of error in the above-entitled cause.

1. The lower court erred in sustaining plaintiff's demurrer to defendant's plea No. 1.

2. The lower court erred in sustaining plaintiff's demurrer as to plea No. 3.

3. The lower court erred in sustaining plaintiff's demurrer to plea No. 4.

4. The lower court erred in giving to the jury the instructions to find for the plaintiff if they believe the evidence.

5. The lower court erred in refusing to give to the jury the written instructions in these words: "If the jury believe the evidence, they will find for the complainant as to the claim for taxes on shares of foreign railroad companies."

W. A. GUNTER,
Att'y for Plaintiff in Error.

[Stamped:] Supreme court of Alabama. Filed Aug. 6 1901. Rob't F. Ligon, Jr., clerk.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Alabama before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between The State of Alabama, plaintiff, and Louisa V. Kidd, as executrix of the will of H. B. Tulane, deceased, defendant, wherein was drawn in question the validity of a statute of, or an authority under, said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error has happened, to the great damage of the said Louisa V. Kidd as by her complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday in October next, in the said Supreme Court to be then and there held, and the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court, Middle District of Alabama.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 6th day of August, in the year of our Lord one thousand nine hundred and one.

J. W. DIMMICK,
Clerk of the United States Circuit Court for the Middle District of Alabama.

Allowed by—
THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

[Stamped:] Supreme court of Alabama Filed Aug. 6 1901. Rob't F. Ligon, Jr., clerk.

27 Supreme Court of Alabama.

LOUISA V. KIDD, as Executrix, etc.,
v.
STATE OF ALABAMA.

The defendant, Louisa V. Kidd, as executrix of the will of H. B. Tulane, deceased, having this day filed her petition for writ of error from the decision and judgment thereon made and entered, to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying an order to be made fixing the amount of security which this defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Supreme Court, and said petition having this day been duly allowed and the security being now offered and approved, it is therefore ordered that upon the filing of the said security with the clerk of this court in the sum of $12,000.00, all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

Dated the 6 day of August, 1901.

THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

28 Supreme Court of the United States.

LOUISA V. KIDD, as Executrix, etc., Pl't'ff in Error,
v.
STATE OF ALABAMA, Def't in Error.

The United States of America to the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Louisa V. Kidd as executrix of the will of H. B. Tulane deceased, is plaintiff in error and The State of Alabama is defendant in error, to show cause, if any there be, why the judgment rendered in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Thos. N. McClellan chief justice of the supreme court of Alabama, this 6 day of August in the year A. D., 1901.

THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

Service of the above notice accepted and copy received.
Aug. 7th 1901.

GORDON MACDONALD,
Att'y for State of Alabama.

Endorsed on cover: File No. 18,256. Alabama supreme court. Term No. 403. Louisa V. Kidd, as executrix of the will of H. B. Tulane, deceased, plaintiff in error, *vs.* The State of Alabama. Filed August 28th, 1901.

18526

18527

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

LOUISA V. KIDD, AS EXECUTRIX, ETC.,
PLAINTIFF IN ERROR,
v.
THE STATE OF ALABAMA.
} No. 403.

In Error to the Supreme Court of the State of Alabama.

MOTION TO ADVANCE.

Comes the Defendant in Error in this cause and moves the court to advance said cause on its docket, and for reason therefor assigns the following:

Because said cause involves, in a most important particular, the constitutionality of the revenue laws of the State of Alabama, and the State is being materially hindered in the collection of her taxes.

THOS. H. CLARK,
Counsel for Defendant in Error.

Plaintiff in Error hereby consents that the aforesaid cause be advanced on the docket of the court.

W. A. GUNTER,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

NOVEMBER TERM, 1901, No. 403.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED,

Plaintiff in error,

v.

THE STATE OF ALABAMA,

Defendant in error.

ARGUMENT OF W. A. GUNTER

FOR THE PLAINTIFF IN ERROR IN THE ABOVE AND A SIMILAR CASE, WHEREIN LOUISA V. KIDD, INDIVIDUALLY, IS PLAINTIFF IN ERROR, SUBMITTED UNDER AGREEMENT OF COUNSEL ALONG WITH THIS CASE AND TO ABIDE THE RESULT THEREIN.

STATEMENT OF THE CASE.

This case comes up on a writ of error to the Supreme Court of Alabama in a suit to collect back taxes against the appellant, as executrix, for five years prior to the assessment, on certain stocks held by her in her representative capacity in certain railroad corporations located and doing business outside of the State of Alabama, which it was claimed were not taxed, or, if taxed, that the law was unconstitutional, because similar shares in domestic corporations and of foreign corporations doing business in the State of Alabama were exempt.

FACTS.

The two cases to which the brief applies were twice before the Supreme Court of Alabama. The first report of the case is in 28 So. Rep. 480. On the last appeal no opinion was pronounced, but the case was affirmed on the authority

of the previous decision. See decree of affirmance, page 15 of the Record.

In the first trial in the Circuit Court, to which the case had been appealed from the Court of County Commissioners and heard *de novo*, it was held that the tax was invalid; but, on appeal, the Supreme Court overruled all objections of every kind. 28 So. Rep., *supra*, and sent the case back for a new trial to the Circuit Court.

On the second trial in that court there was a judgment for the State which was affirmed on appeal, as above stated.

Tulane, the testator of plaintiff in error, was a citizen of Alabama and was possessed of a large amount of stocks in foreign corporations doing no business in Alabama. The amount of such stocks was $1,007,500. See Record, page 9. Tulane died in 1897, and in 1898 his estate was taxed on these stocks for the preceding five years. It was admitted that no taxes had been paid upon these stocks, and that the corporations in which they were held were located in other States than Alabama, and that during the years for which the taxes are claimed they did no business in Alabama and had no property therein and gave in none for taxation, and that said corporations were all railroad companies. Record 9.

The only question in the case is the validity of the taxation of these shares under the XIVth amendment of the constitution of the United States. The point was raised by pleas, as well as by charges given and asked.

ASSIGNMENT OF ERRORS.

The plaintiff in error makes the following assignment of errors:

1. The court erred in sustaining the demurrer to the first plea of the plaintiff in error which is in these words:

"1. That her said testator in his life-time, and she as his executrix after his death, which occurred in October, 1897, regularly gave in for assessment for each of the years for which taxes are now

claimed in said complaint all of the property belonging to the said Tulane during his life and to his estate after his death, in the State of Alabama, which was taxed by the laws of Alabama, except the shares of the capital stock of railsoads owned by said Tulane in his lifetime, and belonging to his estate after his death, which said railroads were and are corporations created by and located in other States than the State of Alabama, and which did not extend into Alabama, and which did no business in Alabama during any of said years. And that taxes were duly assessed against the property so given in, and paid by said Tulane in his lifetime and by defendant since his death. And defendant says that all of said taxes now claimed of her are for and on account of said shares in said railroads so owned by said Tulane in his lifetime and by his estate after his death and not given in for assessment. That said Tulane was, during his life, a resident and citizen of the State of Alabama, and that defendant is also a resident and citizen of said State.

Defendant says that if the laws of Alabama impose the taxes claimed in this suit upon said shares of said railroad companies, the same are illegal and void and violative of the Constitution of the United States and the XIV Amendment thereof, in that there is no similar tax imposed by said laws upon the shares of domestic railroads or upon the shares of foreign railroad companies doing business in the State of Alabama. And defendant claims the benefit of the protection of the Constitution of the United States against the collection of the taxes claimed in this suit."

See Record, pp. 5 and 6.

2. The lower court erred in sustaining the demurrer to the third plea of the plaintiff in error, which is in the following words:

"3. And for further plea in this behalf, defendant says that the claim for taxes for which this suit is brought is in large part for taxes on shares in the capital stock of foreign corporations owned by said Tulane in his lifetime, and by his estate after his death, and which said corporations were not located in Alabama and did no business in Alabama, and the shares in which were not subject to taxation for the years for which taxes are claimed in said complaint, because no similar taxes are imposed upon the shares of like domestic corporations and foreign corporations doing business in the State

of Alabama. And so defendant pleads against the collection of the taxes assessed against her on said shares of foreign corporations, that the laws imposing the same are illegal and void under the Constitution of the United States and the XIV Amendment thereof. And as to other taxes claimed of her in said complaint, she denies each and every allegation of the complaint respecting the same." See Record, p. 6.

3. The court erred in giving at the request of the plaintiff in the lower court the following charge to the jury:

"If the jury believe the evidence in this case, they will find for the plaintiff." See Record, p. 10.

4. The lower court erred in refusing to give to the jury the following written charge asked by the defendant in the lower court, plaintiff in error in this court, to-wit:

"If the jury believe the evidence, they will find for the defendant as to the claim for taxes on shares of foreign railroad companies." See Record, p. 10.

ARGUMENT.

It was insisted to the Supreme Court of Alabama that there was really no law of the State taxing the shares of stock which are the subject of this suit. But the Supreme Court having construed the statutes of Alabama to impose a tax, the only question which we can consider here is the validity of the taxes under the XIVth amendment of the constitution of the United States guaranteeing to citizens the equal protection of the laws. It is insisted that similar shares of stock in domestic railroads and foreign railroads having some property within the State were wholly exempted from taxation, and that, therefore, the law imposing the tax on the shares held by the plaintiff in error was unconstitutional.

By section 451 of the Code of 1886, which governs this case, except the taxes for the year 1897, it is provided that

the following property and persons shall be exempt from taxation:

..... "8. The shares of the capital stock of any company or corporation which is required to list its property for taxation in this State shall not be assessed against the share-holders of such company or corporation."

By Section 494 of the Code of 1886, railroads were required to list their property for taxation. The section provides that

"On or before the first day of April of each year, the president, secretary or auditor of any railroad whose track or road bed, or any part thereof, is in this State.....shall under oath make to the State auditor a return in writing of the total length and value of such railroad, including the right of way, road-bed, side-tracks and main track in this State, and specifying the total length and value thereof in this State, and in each county, city and incorporated town in this State; and also of the number and value of the locomotive engines, and passenger, freight, platform, construction and other cars of such company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale, or other disposition for a profit by such company to employees or other persons in this State, for the year next preceding the return; and such return the auditor shall lay before the State board of assessment at its next meeting thereafter."

By Section 509 of the same Code, it is provided that

"All property, real or personal, belonging to railroad, telegraph, sleeping-car and express companies, which is not required by the provisions of this article to be returned to the auditor, must be returned to the tax assessor of the county in which it is taxable, and by him assessed as other property in the county is returned and assessed."

By Section 453 of the same Code, the subjects and rates of taxation, are stated, so far as pertinent, as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 60 c. on each one hundred dollars in value upon the following property.....Clause 9: The capital stock of all corporations, companies or associations created or existing under

any law in force in this State, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association; but when such corporation, company or association pay the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation, company or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed."

"Clause 11. The road-bed, track and other property, real and personal, of railroads."

"Clause 13. All other property, real and personal, not otherwise specified herein."

By the Code of 1896, which applies to the taxes for the year 1897, in controversy in this case, the exemption is embodied in the tax law by exception.

Section 3911 is as follows:

"For the use of this State and to raise revenue therefor, there is levied an annual tax of 55 c. on each one hundred dollars in value upon the following property:"

Clause 9 of this section:

"Every share of any corporation organized under the laws of this State, or any other State, or of the United States, (other than railroad, telegraph, express and sleeping-car companies, building and loan associations and banks or banking associations, to be assessed and collected in the county wherein such association has its chief or home office in this State, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation."

The remainder of the clause provides a mode of making returns for the collection of taxes provided for in the clause.

Section 13. "The road-bed, track, and other property, real and personal, of railroads, and all tram-roads, pole-roads, canals, ditches, and channels used for transporting lumber, timber, logs or other valuable commodities of commerce, which are not taxed as improvements on the land, or plant, or main property of such tramroads, pole-roads, canals, ditches or channels."

Section 14. "All other property, real and personal, not otherwise specified herein, including cotton, pig-iron, manufactured goods and other things of value."

The only question before the Court, therefore, is, whether clause 13 of Section 453 of the Code of 1886, and clause 14 of Section 3911 of the Code of 1896, above quoted, could consistently impose a regular tax on shares owned by citizens in foreign railroads or other foreign corporations doing no business in Alabama. The point was regularly raised and pressed on the first trial of the case in the lower court, and in the Supreme Court, and the Supreme Court decided it adversely to the plaintiff in error in the case reported in 28 So. Rep., 480, though not expressly referring by name to the Constitution of the United States.

The following is an extract from an argument made to the Supreme Court of Alabama upon the first appeal:

"We now appeal for the same protection to the XIV Amendment of the Constitution of the United States. That section has been too often construed to operate against any substantial inequality in the imposition of public burdens, to need any extended consideration. If it be conceded that the laws in question imposed no taxes on shares in domestic corporations, or allowed certain deductions in cases of domestic corporations, and imposed a tax on the same species of property held in foreign corporations in the one case, or provided for no similar deduction in the case of foreign shares, it would be disrespectful to the court to assume that it was ignorant of the unconstitutionality of such a law, under the XIV Amendment of the Federal Constitution. We therefore merely cite a few of the [illegible] cases, making the application which we now insist on, out of the hundreds cited in the Code of Alabama, page 25:

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S., 150.
Blake v. McCling, 172 U. S., 260–1.
Lake Shore R'y Co. v. Smith, 173 U. S., 205.
Nat. Bank of Wellington v. Chapman, 173 U. S., 205.
Jones v. Brim, 165 U. S., 180.
St. Louis & San. F. R'y Co. v. Matthews, 165 U. S., 1.

It is simply impossible to consistently hold that persons have the

equal protection of the laws, when one must pay taxes on his shares in foreign corporations, while the other is exempt from paying on like shares in domestic corporations or those doing business in Alabama.

On the plainest principles, then, the law in this case, even if it expressly levied a tax on shares in foreign corporations and those doing no business in Alabama, would be violative of the Constitution of the United States."

On the return of the case to the Circuit Court, the deck was cleared for an appeal to this court by the withdrawal of the old pleadings and the filing of new pleas. The judgment entry shown on page 8 of the record is: "This day came the parties by attorneys, and by consent, the pleas of defendant heretofore filed are withdrawn and defendant demurs to the complaint as shown by the record and from demurrers on file, which demurrers being understood by the court, it is considered and adjudged by the court that the demurrer is hereby overruled and held for naught. Thereupon the defendant filed sundry pleas." These pleas are shown on pages 5 and 6 of the record. It is sufficient to say that pleas one and three distinctly raise the question of the validity of the taxation in question under the constitution of the United States, because no similar taxes are imposed upon the shares of like domestic corporations and foreign corporations doing business in the State of Alabama. The lower court sustained a demurrer to these two pleas. See demurrer, Record page 7; judgment on demurrer, Record page 8.

The point was likewise raised upon charges to the jury. The court, at the instance of the defendant in error, charged the jury that if they believed the evidence in this case they would find for the plaintiff, and the plaintiff in error asked the court to give the following charge to the jury: "If the jury believe the evidence, they will find for the defendant as to the claim for taxes on shares of foreign railroad com-

panies," which charge the court refused, and the defendant duly excepted. Record 10.

By section 3840 of the Code of Alabama, which has been in force many years, the Supreme Court is freed from the usual rule that a first decision settles the law of a case. The words of that section as far as pertinent, are: "The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time, is law, without any regard to such former ruling on the law by it."

So that the court was perfectly free to to make a proper decision on the constitutionality of the law on the second appeal, no matter what its decision was on the first appeal, and if the question had not been raised on the first appeal. But the question was as vigorously pressed upon the first appeal as upon the second.

The following is a copy of a part of a brief submitted to the court upon the last appeal:

LAW POINTS.

It is insisted:

1. That there was no law directing these shares to be taxed.

2. That the law having exempted shares of domestic railroad companies and of foreign corporations doing business in Alabama from taxation, the law taxing the appellant on her shares in foreign corporations doing no business in Alabama is violative of the constitution of Alabama.

3. And for the same reason is violative of the constitution of the United States.

ARGUMENT.

The foregoing law points were all presented to the court on the former appeal and ruled against the appellant, but there being no right to appeal from the judgment of this court, which was one of reversal, we had to await a final judgment.

We presume that the court will adhere to its rulings heretofore

made and affirm the judgments of the lower court, which are in strict accordance with its directions; still, it is our duty and pleasure to present again our views in the hope that the court may change its opinion.

1. The statute is violative of the State and Federal constitutions. An inspection of the tax laws shows that shares in railroads organized or doing business in Alabama were expressly exempted from taxation."

We make these quotations simply for the purpose of showing to the court our diligence in presenting the constitutional question to the courts of Alabama, which is now insisted upon.

It would make no difference, however, if the question involved had not been presented and urged upon the consideration of the lower court, for it arises under the second clause of section 709 of the Revised Statutes. It has been frequently held by this court that it is only where the right or privilege of immunity is claimed or arises under the third clause of that statute, that the point must be diligently asserted, and will not be reviewed for the first time in the Supreme Court. Where the point, however, draws in question the validity of a statute of, or an authority under the State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, the court will take notice of such rights, whether they are asserted in the lower court or not, because the decision of the case, no matter how it may be stated, necessarily involves the question.

Yazoo & Miss. R. R. Co. v. Adams, 180 U. S. 14.

Eastern Bldg., Etc., Assn. v. Welling, 181 U. S. 47.

Columbia Water Power Co. v. Columbia Electric St. Ry., 172 U. S. 475.

Willson v. Blackbird Creek Marsh Co., 2 Pet. 45.

Satterlee v. Matthewson, 2 Pet. 385.

The general doctrine that, in the imposition of public burdens in the way of taxation and in other legislation by the State affecting the rights of citizens, there must be no

18534

discrimination as to persons or classes which is purely arbitrary, oppressive or capricious, such as would be pure favoritism and a denial of the equal protection of the laws to the less favored persons or classes, is recognized in all the cases, of which there are a great many. We need to cite at present only four, since they recognize the principle and refer to all the authorities and considerations which govern in such cases. These cases are:

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 293.

Nicol v. Ames, 173 U. S. 509.

Atchison, Topeka & S. F. R. R. Co. v. Matthews, 174 U. S. 96.

The last case cited particularly affirms the principle, both in the majority and dissenting opinion, and the authorities bearing upon the question are cited in each of these opinions. As stated in the case of Nicol v. Ames, *supra*, "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

And, as stated in the case in 174, *supra*, p. 104, "The classification must proceed upon a substantial difference which has a reasonable relation to the object sought to be accomplished by the statute."

Thus, in the case last mentioned, the statute was held to be a police regulation to prevent fires and to require from railroads in the operation of their trains the observance of great caution. For this reason, the statute was upheld, whereas, in the case of Ellis in 165 U. S., *supra*, it having no such distinction to rest upon, the statute was declared void.

The statute impeached in this case is in the general revenue bill of the State. Its sole purpose is the collection of revenue, and is so declared in the opening clause. It is a taxation upon values, and not a privilege or license tax or

police regulation, so that the only question in this case is, whether in a general revenue bill, having for its sole object a taxation upon values, for general purposes of the State, it is allowable to tax A upon the value of his shares in railroads out of the State, and to exempt B on his shares in like railroads operating within the State. That there is classification in this case, no one doubts. The Supreme Court says that there is classification, and says that the State has a right to classify, and we admit that it has a right to classify. But the question still is, does the classification "proceed upon any difference which has a reasonable relation to the object sought to be accomplished;" "whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based on no real distinction and entirely unnatural."

We ask only two predicates for this argument, neither which can be denied: One, that this is a tax upon values; the other, that property which has a figurative domicil or venue for taxation is entitled to claim the same for protection. The constitution of the State and the statute itself say the tax is and must be in exact proportion to the value.

Value theoretically means, and practically is, the exchangeable estimate, after all deductions are made affecting the worth of an article. Thus, in the case of domestic shares, all proper deductions are made in the general market for taxes against such shares or against the corporate property. So, likewise, in the case of foreign shares, the market value represents the net worth after all like deductions. Value, thus, in every case, is a net result to the possessor, and simply indicates what the article commands in the market in cash. Two citizens, then, possessing respectively the same amount in value, one of domestic and the other of foreign shares, have the use and enjoyment of identically the same amount of net property of a like kind in every respect. Therefore, to exempt one of them from taxation, while the other is made to pay taxes, seems to fall directly within the inhibition of the XIVth amendment to the constitution

guaranteeing to every citizen the equal protection of the laws.

The Supreme Court of Alabama, in its opinion in 28 So. Rep. 482, attempts to justify this discrimination by saying:

"The exemption and likewise the distinction between the two classes of corporations could only have been inspired by the consideration that the burden certainly imposed by our laws on property of a corporation would indirectly diminish the value of its stock, while, in the case of the corporation having no property within its jurisdiction no such result could follow, except from foreign legislation over which this State has no control and for which it is in no way responsible."

We have but to overthrow this statement. It is the only vindication which can be set up of the statute in question.

The tax is imposed upon the owner of foreign shares upon the sole theory that such shares, by fiction of law, are located at the domicil of the owner. That is, they are within the jurisdiction of the taxing power. The very theory of taxation, therefore, hypothesizes A as the owner of foreign shares, and B. the owner of domestic shares, as both possessed of the same value of railroad stocks in the same taxing district. It would be monstrous, therefore, to tax one because, by fiction, his property was within the jurisdiction, and then discriminate against him upon the fact that his property was without the jurisdiction. The law must be consistent, at least so far as to be just.

Again, the court says that the classification and discrimination in taxation is justified upon the theory that the value of the domestic shares is supposed to be diminished by taxation of this State upon the corporate property, and that this would not be the case as to foreign shares except it be from foreign legislation. There are two prime objections to this argument: The first is, that in taxation the legislature can only look at *actual* values, and not at the *causes* of actual values. No matter what may be the causes of values, these causes if they diminish or increase the value, are self-

adjusting, since they leave for taxation in every case the net result after all deductions have been allowed on account of all causes affecting the value. Thus, there can be no injustice or double taxation in taxing domestic shares, though they were affected by taxation against the property of the corporation, since only the net value of the shares would be taxed after allowance for all such causes.

In the next place, the value of foreign shares has no advantage over domestic shares in being situated beyond the State, since the value of the shares in that case, as in the case of domestic shares, is a net result to the owner, irrespective of all particular causes influencing the value. So that the case in the abstract and in the concrete is this: Can B, the owner of shares actually within the State, be exempt from taxation, while A, the owner of foreign shares by fiction also within the State for purposes of taxation, is required to pay taxes upon the identical class of property? The case seems really too plain for argument.

In this case, the value may be supposed to be the same, the class of property identical, the residence of the owners the same, their duties to the State the same, and the sole difference for classification, exempting the one and taxing the other, that the income of the one owner is derived from the dividends of the local company, while the income of the other is derived from the foreign company. In other words, the statute makes the *situs* of the ownership of corporate property the same for taxation, and makes the *situs* different as a basis of discrimination against the owners of shares in foreign corporations.

The constitutional provision invoked in this case has never been construed to be any restriction upon the widest range of just taxation, but only of irrational and discriminating levies founded upon prejudice or other arbitrary rules. And such, we submit, is the case at bar. In taxing identical classes of property, value can only be viewed, and the ratio of taxation must be the same on the same valuation.

Whether the burdens that affect that valuation result from taxes to one commonwealth or another is a collateral and outside question.

Since the residue or actual value after all deductions are made, is the resultant property of the citizen alike in every case and, being of the same class of property, and by fiction for purposes of taxation supposed to be located within the taxing district accompanying the person of the owner, must be taxed or exempted without the arbitrary distinctions made by the statute in question. If foreign shares are present for taxation they are at the domicil of the owner for protection.

The State may not say "that all white men would be subjected to the payment of attorney's fees of parties successfully suing them, and black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any basis for the attempted classification. That must always rest upon the same difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." This is the language of the court in the case of Ellis, 165 U. S., *supra*.

In the case of State v. Loomis, 115 Mo. 307, it is said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

Any number of authorities may be cited for this principle, but it is a, b, c law to this court, and there is no need to pursue the question further. We simply say that A, possessed of a certain value in railroad shares and living in Alabama, and B, possessed of the same value of shares and living in the same State, can not be classed for taxation differently, simply because B's value is derived from ownership in domestic railroads, while A's is in foreign railroads. The legislature might as well tax people differently according to their diet. How would it do to tax B because he feeds on Kansas beef, and exempt A because he eats Alabama beef?

We believe it is insisted that the statute of 1897, above quoted as Section 3911 of the Code of 1896, does not really exempt shares of railroads, and thus that the tax covered by that statute is not open to the constitutional objection. This contention is founded upon the idea that clause 9 of the section referred to, in these words, "every share of any corporation organized under the laws of this State, or of any other State, or of the United States (other than railroad, telegraph, sleeping car companies, building and loan associations and banks or banking associations), to be assessed and collected in the county wherein such corporation has its chief or home office in this State and to be assessed at its actual market value in the name of the person in whose name such shares stand on the books of the corporation, and not to the corporation," simply exempts the shares referred to by way of exception, from the operation of that clause, while they are embraced in clause 14, which is in these words: "All other property, real or personal, not otherwise specified herein, including cotton, pig iron, manufactured goods and other things of value."

But this contention is untenable. The same tax is imposed upon all articles in each clause of the section. The clauses are for the purpose only of specifying the property

that is to be taxed. Shares of corporations are dealt with in two clauses of the section. In clause 8 the shares in banks and banking associations are dealt with. In clause 9 shares in other corporations are dealt with, the language being as above stated, "every share of any corporation organized under the laws of this State, or of any other State, or of the United States (other than railroad, telegraph, sleeping car companies, building and loan associations and banks or banking associations)." The last clause, clause 14, as it expressly says, is to cover only property real and personal "not otherwise specified herein," that is, not dealt with specifically.

The exemption in clause 9 of the particular shares embraced in the exception is an exemption from *the tax*, and not an exemption from a mere mode of collection specified in the clause of the taxes which are levied thereby. And the exemption is made as to railroads in consideration of the fact that by clause 12 a tax is levied on all property of railroads within the State; and as to other corporations, that there are also special taxes levied upon them. Beyond this, the Supreme Court of Alabama, in its decision upon this statute, concedes that there is an exemption, and attempts to justify it by saying that the exemption therein relates only to the shares of railroads and other corporations "having property subject to taxation here." The court further says:

"The exemption of these shares is doubtless for the reason that elsewhere special provisions are made for taxing the property and privileges of the last named corporations, which provisions could have no application to foreign corporations having no property and doing no business here. As to shares in them, we find nothing in either Code which should be construed as an exemption."

Thus, the Supreme Court admits the exemption of domestic shares from taxation, and insists upon the right to tax shares in foreign corporations doing no business in the State.

The question is thus stripped of every circumstance calculated to embarrass its consideration. The simple proposition is:

Whether the State of Alabama can, in a general revenue law, exempt from taxation its citizens who own shares of any given value in corporations having some taxable property in the State, and at the same time tax its citizens who own the like shares in like corporations that have no taxable property within the State.

We submit that a classification founded on such distinctions falls strictly within the inhibition of the constitution. Citizens have a right to buy and own all vendible property, and when fiction gives it a situs with the domicil of the owner for purposes of taxation justice retains the situs for protection. The question then really is: Can A and B, owning property of the same kind and value and of the same situs, be taxed differently by any classification founded merely on historical data respecting their property?

And this question is in effect decided by the Supreme Court of Alabama in the case of State Bank v. Board of Revenue, 91 Ala., 223, where the Court says shares in State banks and in National banks belong to the same class for taxation, and that any attempt to draw a distinction between them as subjects of taxation would be futile. Certainly, if State banks and National banks belong to the same class it is clear that shares in railroads belong to the same class, though they are chartered by different States.

Before concluding, we notice one or two cases much relied upon by appellee.

One is Pacific Express Co. v. Seibert, 142 U. S., 339. This case was one in which it was insisted, that it was an arbitrary distinction to class as express companies persons or corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, and tax their business and not tax by the same rule persons and

corporations doing an express business with their own property.

The court very clearly shows, on pages 353–4, that the legislation in question was not an invidious discrimination, but was founded on an "essential difference between express companies as defined by this act and railroad or steamboat companies or other companies that own their own means of transportation"—the distinction being that railroad companies pay taxes on their property, as well as generally upon their franchise, while express companies as defined by the act could be reached only by a tax "upon their receipts for business transacted," the Court saying that "in the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The case affirms the exact principle here contended for and makes the precise distinction recognized in all the cases, viz: That classification for taxation must be founded, as expressed in Atchison, etc. v. Mathews, 174 U. S., 96, on some "substantial difference which has a reasonable relation to the object sought to be accomplished by the statute." In the case at bar, revenue is the declared object of the statute—and value is the basis of taxation. Shares in railroads belong to the same class—they may be supposed identical in value—and both located in the same taxing district, by being attached to the domicil of the owner. How, then, can the legislature look into the history of the shares and class shares in foreign corporations having no property in this State for taxation and exempt shares in domestic railroads? Such a distinction has no relation to the object of the statute. The decision of the Supreme Court of Alabama in the case at bar says that "the ownership of shares in capital stock is distinct from ownership of capital stock itself." 28 So. Rep. 482. And there can be no question that this distinction is correct.

New Orleans v. Houston, 119 U. S., 265, 277.
Gibbons v. Mahon, 136 U. S., 549.

Van Allen v. Assessors, 3 Wall. 573.
Farrington v. Tennessee, 95 U. S., 679, 687.

The domicil of the railroad therefore can not justify any discrimination against individual owners of the shares.

Another case is American Sugar Refining Co. v. Louisiana, 179 U. S., 89. In that case it was claimed that sugar refineries could not be taxed because there was an exemption in favor of "planters and farmers grinding and refining their own sugar and molasses." The Court shows that the discrimination was founded on a reasonable distinction in principle. That farmers and planters who simply put their products in condition for the market could be classed differently from those persons in the business of refining generally. This case bears a great similarity to the case of Seibert in 142 U. S. above noticed. And we refer to it and the instances and authorities mentioned in the opinion as fully sustaining the contention of the plaintiff in error.

We find no opinion of any of the judges who have ever been members of this Court which contains any expression which can legitimately be made to sustain the tax in this case.

W. A. Gunnels

18540

Supreme Court of the United States

NOVEMBER TERM, 1901. No. 403.

LOUISA V. KIDD, as Executrix of the Will of H. B. TULANE, Deceased, Plaintiff in Error.

v.

THE STATE OF ALABAMA, Defendant in Error.

Reply Argument of W. A. GUNTER for the Plaintiff in Error.

FIRST POINT.

The first point of the argument by Messrs. Caffey & Breckenridge is, that the pleas purported to answer the whole complaint, and if they do not answer the entire demand they were open to the demurrer. The answer to which is, First, that the pleas do in fact answer the whole complaint, and second, that the demurrer can not be considered except as to the specific objections noted—and the argument of counsel admits that the ground of objection which is argued was not stated in the demurrer.

The Code of Alabama, § 3303 is: "No demurrer in pleading can be allowed but to matter of substance, which the party answering specifies; and no objection

can be taken or allowed which is not distinctly stated in the demurrer."

If the ground had been good, and had been stated, the pleas could have been amended so as to narrow them to meet the objection.

Turner v. Glover, 101 Ala. 294.

The argument in chief, however, sufficiently shows we think that the assessments under both the Codes of Alabama are open to the same fault.

SECOND POINT.

The second point is a denial that taxation, under the Code of 1886, of citizens on shares in foreign corporations and the exemption of domestic shares, deprives plaintiff, as the owner of foreign shares, of the equal protection of the laws.

Five reasons are assigned for this conclusion:

First. That the State may discriminate if the "discrimination is reasonable in principle." This we admit to be true.

Second. "There is no fixed test of what basis of classification is reasonable." This also we admit to be verbally true. But it does not follow that there is no "fixed principle" applicable to all cases. And we deny that the State can tax A. on the value of his property, having its situs within the State for taxation at a greater rate than B. on the value of the same class of property because the latter happens to own shares in domestic instead of foreign corporations. When items of property are of the same actual and physical class, and have a value in the market, the basis that taxes the one be-

cause the value is an ownership in shares of a foreign corporation and exempts the other because it is an ownership in shares of a domestic corporation appears to be "arbitrary, oppressive and capricious."

The conditions of the owners are identical—they are taxed on shares solely on account of their personal domicil. Figuratively, the shares of one follow his residence that they may be taxed, and figuratively the shares of the other also attach to the locus of his residence. If the residence is in a given city the owner can only be taxed there, though the shares may be in a railroad in a different section of the State.

Boyd v. Selma, 96 Ala. 144.

The case of Pacific Express Co. v. Seibert, 142 U. S. 352, referred to by counsel, has already been considered in the argument in chief. See pages 18 to 19.

Third. The third reason of counsel is that the State may encourage investments within her bounds by taxing to death foreign investments. This, if sound, would allow the State to tax property of its own citizens at a different rate to that imposed on the same property owned by citizens of other states, and thereby encourage immigration of persons.

Fourth. The fourth reason is that a law of discrimination against the owner of foreign shares prevents escapes from taxes. We do not see the force of this. The right to shoot an innocent man, to prevent an escape if crime should be committed, is a new political or legal dogma to which we cannot subscribe.

Fifth. The fifth reason is that value is not the "sole basis of taxation." This may be admitted. The rule

is properly laid down in the quotation made by counsel from 148 U. S., 662, viz: "That there must be no discrimination in favor of one as against another of the same class." There is such discrimination when the red-headed man pays double taxes for being ugly, while the dark-haired citizen is exempt or pays a single tax; and the discrimination is no less glaring when it taxes the owner of foreign shares and exempts the owner of domestic shares.

The conclusion of counsel shifts the argument from one relating to the taxation of individuals to a classification and taxation of corporations. There is no such question in this case—which relates entirely to the taxation of persons on the values of intangible property *possessed by them at their domicil* within the State. By fiction of law such property has its legal *and thus actual* situs as the domicil, and if by its natural properties there is but one class, there can be no discrimination as to items because by historical association or connection with a foreign corporation one value takes its head beyond the State, while the other has its source within the State. Apples or other products *within the State*, and they must be within this jurisdiction to be taxable, when listed for taxation cannot be classified into products of foreign or domestic growth—neither can intangible property, which, after all, is but a *thing, in action*. The power to tax a thing *in action* by a classification having reference solely to the *locus a quo*, implies the power to tax the same thing *in possession* with reference to the same *locus a quo*. And the existence of such a power would override the constitution and establish within our border the abominable Chinese Linkin. While the State may as a condition of doing business within its borders to some extent make its own terms with foreign corporations, it has no such power as to

citizens of the States; they may reside where they please and invest their capital where they please, and the State is absolutely without power to discriminate against an investment beyond its borders. If it assumes to tax such property it must do it by the same measure and rule as that by which similar investments at home are taxed.

It is a departure in logical reasoning to say that corporate property represents shares for taxation within the State, but does not represent shares without the State.

W. A. Gunter

Attorney for Plaintiff in Error

Supreme Court of the United States

OCTOBER TERM, 1902. NOS. --- AND ---

LOUISA V. KIDD, *as Exexutrix, Plaintiff in Error,*

v.

THE STATE OF ALABAMA, *Defendant in Error.*

LOUISA V. KIDD, *Plaintiff in Error,*

v.

THE STATE OF ALABAMA, *Defendant in Error.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Louisa V. Kidd as Executrix of the will of H. B. Tulane, deceased, plaintiff in error in the cause first above entitled, and Louisa V. Kidd (individually), plaintiff in error in the second above entitled cause, depending in this honorable court, involving the same question and by stipulation of counsel to abide by the decision in the first of the above entitled causes, respectfully represents, that in the opinion and decree pronounced at the present term of this court in said causes, she is grieved thereby, and she petitions for a rehearing and reconsideration of said opinions and decrees.

The grounds of this application are:

1. That the Fourteenth Amendment of the Constitution prohibits the taxation against citizens of shares of stock in railroads doing no business in the State or having no property in the State merely because such railroads are not located or doing business in the State, while the shares in such railroads as are located in, or as pay *any* taxes to the State, are exempted from taxation.

2. That the individual shares in corporations and the capital stock and property of a corporation are distinct property rights and subjects of taxation, and that the *venue* of the corporation's domicil cannot change the species of property of individuals in shares, so as to classify property rights therein on that basis for taxation.

3. That shares of individuals in corporations of the like kind belong to one species of property inherently and for purposes of taxation, and that they must be taxed or exempted alike.

LOUISA V. KIDD,
As Executrix and individually, by her attorney,
W. A. GUNTER.

I, William A. Gunter, counsel for the petitioner in the above mentioned cases, and in the foregoing application for a rehearing therein, hereby certify that in my opinion the said petition is well grounded in point of law.

Montgomery, Ala., April 6, 1903.

W. A. GUNTER,
Counsel for Petitioner.

ARGUMENT IN SUPPORT OF THE FOREGOING APPLICATION FOR A REHEARING, BY W. A. GUNTER, ATTORNEY FOR PLAINTIFF IN ERROR.

I.

IT IS NOT COMPETENT FOR A STATE TO EXEMPT FROM TAXATION SHARES OF RAILROADS LOCATED IN THE STATE, AND OF ALL RAILROADS NOT SO LOCATED THAT ARE REQUIRED TO RETURN ANY PROPERTY WHATEVER FOR TAXATION, AND AT THE SAME TIME TO TAX SHARES IN RAILROADS THAT HAPPEN TO PAY NO TAXES TO THE STATE.

We think that the court did not quite consider the case in the view above expressed, but, referring to the case of Sturges v. Carter, 114 U. S., 522, regarded the question as being, whether the State could tax foreign shares, while exempting shares in roads paying taxes upon "all or substantially all, their capital and property."

While we contend, and will endeavor further on to show, that even the latter question should be answered in the negative, it is sufficient in this case to answer that the record presents the first question according to our construction of the case made and submitted.

This apparent misapprehension of the point of the case, and the fact that two of the judges agree with the contention of the appellant, and the great importance of the constitutional question involved, induce us to believe that this appeal will not be considered as a trespass upon the time of the court.

The case of Sturges v. Carter, *supra*, did not involve

the question of the constitutionality under the fourteenth amendment, of a tax levied, but the construction of an exemption claimed under a statute. And the response of the court was simply as to the meaning of the statute involved. The law said:

"No person shall be required to include in his statement (assessment) any share or portion of the capital stock or property of any company or corporation which is required to list or return *its capital and property for taxation in this State*," and: "No person shall be required to list for taxation any certificate of the capital stock of any company *the capital stock of which is taxed in the name of the company*."

Sturges v. Carter, 114 U. S., page 520.

The defendant claimed that his stock, in the Western Union Telegraph Company, was exempt from a general tax law, because the corporation had some property in the State on which it paid taxes, though its capital stock and property at large were not required to be, and were not given in for taxation.

The court said that the exemption only covered stock in corporations in which "all, or substantially all, their capital and property" were taxed by the State, and that as the Western Union only returned, and was only required to return, "a small part of their property for taxation in Ohio," the defendant's shares in that company were not within the terms of the exemption. The Ohio statute was construed in Bradley v. Bauder, 36 Ohio St. 28, and was distinctly held not to apply to cases in which the *capital stock* was not listed for taxation, and thus did not extend to a foreign corporation which could not be required to list its capital stock because situated beyond the State. Citing, Railroad Co. v. Pennsylvania, 15 Wall, 300.

But in the case at bar, the exemption clause is wholly different, applying to every case in which the corporation is required to list *property for taxation*. The statute here, previous to 1896, provides that:

"The shares of the capital stock of any company or corporation which is required to list its property for taxation in this State, shall not be assessed against the shareholders of such company or corporation."

Code of Ala. 1886, § 451.

And by section 494 of same Code, railroads were required to list their property by making return as follows:

"On or before the first of April of each year, the president, secretary or auditor of any railroad whose track or road bed *or any part thereof*, is in this State shall under oath make to the State Auditor a return in writing of the total length and value of such railroad, including the right of way, road bed, side-tracks and main track *in this State*, and specifying the total length and value thereof *in this State* and in each county, city and incorporated town *in this State;* and also of the number and value of the locomotive engines, and passenger, freight platform, construction and other cars of such company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale, or other disposition for a profit by such company to employees or other persons *in this State*, for the year next preceding the return; and such return the Auditor shall lay before the State Board of Assessment at its next meeting thereafter."

And by section 509 of the same Code, it is provided that:

"All property, real or personal, belonging to railroad

companies, which is not required to be returned to the Auditor, must be returned to the tax assessor of the county in which it is taxable, and by him assessed as other property in the county it is returned and assessed."

And by section 453 of the same Code, the subjects and rules of taxation are stated so far as pertinent as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 60 cents on each one hundred dollars in value, upon the following property:

Clause 9. The capital stock of all corporations, companies or associations *created* or *existing under any law in force in this State*, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association; but when such corporation pay the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed."

Clause 11. "The road-bed, track and other property, real and personal, of railroads."

Clause 13. "All other property, real and personal, not otherwise specified herein."

And by the Code of 1896, which applies to the taxes for the year 1897, the exemption is embodied in the tax law by exception.

Section 3911 is as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 55 cents on each one hundred dollars in value, upon the following property."

Clause 9 of this section is:

"Every share of any corporation organized under the laws of this State or any other State of the United States (*other than railroads*) to be assessed and collected, etc."

Sec. 12. "The road-bed, track and other property, real and personal of railroads."

Sec. 14. "All other property, real and personal, not otherwise specified herein."

Now, under neither Code is the capital stock of foreign railroads pretended to be taxed against the railroad. It is only the capital stock of corporations created by, or existing under the laws of Alabama, that are taxed under the Code of 1886, that is only of domestic corporations, and as to them, the value of the property in which the capital is invested, and is subject to taxation, is deducted. But all railroads, under both laws, having any property in the State, are required to *list their property* (of course, meaning and saying, such as is in the State) *for taxation*, and, therefore, the exemption from taxation applies to all shares of railroads having *any* property whatever in the State. Such are the express words of the statute. Shares in railroads that have to list property for taxation in the State, are exempt, and therefore the payment of ten dollars tax on property by a railroad, exempts all of its stock from taxation, while stock in other railroads wholly without the State is taxed.

To test more clearly the operation of the law under discussion, we may leave out of consideration the case of shares in domestic railroads, for the present, and view only the case of shares in foreign corporations which have some property in the State, and those which have none.

Railroads having some property, no matter how little, in the State, have to list their property for taxation; the owners of shares in such are exempt from taxation, by the express words of the statute.

Railroads having no property in the State, do not have to list their property for taxation; the owners of shares in such are taxed upon the value of such shares, while the citizen owning the same class and kind of property in a parallel road having half a mile of track in the State is exempt.

Is this, or can this be "substantial justice?" The definition of what is justice in such cases is found in the Constitution of the State of Alabama, construed by its own court, in State Bank v. Board of Revenue, 91 Ala., 223, which is in exact accord with the requirements of the fourteenth amendment of the Constitution of the United States, viz: that taxes for revenue, levied on *values*, must be in the exact proportion of such values, and that property inherently belonging to the same class cannot be taxed differently.

The first question is, do shares in two railroads of equal capital, of equal length, and running parallel except for half a mile at the eastern end of one, and the western end of the other, belong to the same class of moneyed capital? It seems plain enough that no one could assert that there is, or can be, any inherent or

natural difference between the property qualities in the shares of two such roads as could put them into different classes of moneyed capital, if the only difference in the world between the two cases, is, as we may suppose, that one road runs half a mile across an artificial line, into a different taxing jurisdiction, while the other, though of equal length, stops at the line.

If they belong to the same class of moneyed capital naturally, can they be classed separately for purposes of taxation, so as to exempt one and tax the other, on account of the sole distinction between them that in one case the corporation's road extends a short distance within the State, while in the other it stops at the line?

This brings up first, the question on what distinctions may classes for taxation of values for revenue be founded? And second, what is the essential nature of a chose in action or share in the capital stock of a rail road?

The answer to each of these questions is plain enough to be "common place," nevertheless they are directly involved in this enquiry.

The fourteenth amendment would be worthless if mere classification would authorize discrimination in taxation, since there is no limit to classification. If mere classification would suffice, it would be an answer to the most arbitrary discriminations to show that they were the results of classification, and that there was no discrimination as to persons or things of the same class. Therefore it is held that, "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws;" and that, "The classification must proceed upon a substantial dif-

ference which has a reasonable relation to the object sought to be accomplished by the statute;" and that it must bear "a reasonable and just relation to the act in respect to which the classification is proposed;" and can never be without such basis.

State v. Loomis, 115 Mo., 307;
Atchison v. Mathews, 174 U. S., 96;
Gulf C. & S. F. R. Co., v. Ellis, 165 U. S., 150;
State Bank v. Board of Revenue, 91 Ala., 223.

Does the single fact then, that one railroad extends fifty feet or fifty miles in the State of Alabama furnish a distinction for classing the stock of such road differently for taxation on values "for revenue only," from the stock of a road that stops at the state line? Why should such an accident cause or authorize any such discrimination? It does not alter the inherent quality of the property right of the owner of the share from what it was before the railroad crossed the line of the State.

What is the inherent quality and effect of the crossing of the State line? Of course the State might impose terms for the privilege of coming into its territory, but that was not done, and, besides, the exemption of shares from taxation would be no exaction from the corporation, and is placed on no such ground.

It is distinctly asserted in the opinion of the Alabama Court in this case (28 So., 482) that the discrimination and distinction rests upon the idea that the tax on the property of the railroad within the State would be a tax on the shares of that road, and thus authorize the exemption as to the shares in that case.

And the opinion of this court must rest on the same idea or it must, it seems, abandon the rule that the

basis of the classification for taxation must have reference to some inherent difference which bears the same relation to the purpose of the statute. The purpose of the statute being for revenue only, and levied on values and the shares belonging to the same moneyed class, the mere fact that one of the corporations, in which the stock is held, extends across an artificial line, makes no difference *per se* in the character or class of the share of its stock. Any attempt at a distinction as to classes founded on that fact alone must be, as is said in State Bank v. Board of Revenue, 91 Ala., *supra*, futile. The distinction then must be supported, if at all, upon the idea suggested by the Supreme Court of Alabama, that the tax on the property of the road extending into the State was a tax on the shares, and justified the classification of shares into two kinds, one in roads having some property in the State, the other in roads having no property in the State, and exempting the first and taxing the second.

But the position is untenable, and if sound, not decisive. This court has repeatedly decided, and the Supreme Court of Alabama has decided in this case, and it is generally recognized as the law, that shares in a corporation and the capital stock of the corporation are distinct and separate subjects of taxations; the former belonging to the individual and having his domicil, the latter to the corporation; and that each may be taxed without its being double taxation. It is distinctly held that the latter cannot be taxed against corporations not located, though doing business in the State, because the situs of such property is attached to the domicil of the corporation, and thus beyond its jurisdiction. But at the same time it is held that, "investments in stocks in foreign companies, owned by residents here, *being property within the State*," are subject to taxation. "The capi-

tal of a corporation, whatever invested in, and the individual shares of stock, are distinct species of property. —Farrington v. Tennessee, 95 U. S., 679. The owner of a share of stock owns no part of the capital of the company.—Watson v. Spratley, 10 Exch., 236. The corporation is its sole owner. . . ."

Bradley v. Bauder, 36 Ohio St., 28–35.

"It may be conceded that generally the capital or capital stock of a corporation is its property.—Bank Tax Case, 2 Wall., 200; National Bank v. Commonwealth, 9 Wall., 353.

But the shares held by the stockholders are distinct from the capital stock of the corporation, and the taxation of both is not necessarily double taxation."

Sturges v. Carter, 114 U. S., 521;
Farrington v. Tenn., 95 U. S., 679;
Dewing v. Perdicaries, 96 U. S., 193;
Bradley v. Bauder, 36 Ohio St., 28.

"It is well settled by the decisions of this court that the property of shareholders in their shares and the property of corporations in its capital stock are distinct property interests, and that both may be taxed."

Van Allen v. Assessors, 3 Wall., 573;
The Delaware R. R. Tax, 18 Wall., 206;
Gibbons v. Mahon, 136 U. S., 549.

And *a fortiori* the tangible real and personal property of the corporation is separate and distinct from the individual ownership of shares. This being so, and the situs of the share following the domicil of the owner and the situs of the capital stock attaching to the domicil of the corporation, Bradley v. Bauder, 36 Ohio State, 28, it follows, that the excuse or justification for taxing share B in a road listing no property in the State, and exempt-

ing share A in a road listing some property in the State, which shares are of the same moneyed class of investment, having the same situs and the same value, is, that share A is commercially related more or less closely to the railroad C, which has some property in the State, and pays a portion of its tax levies.

This, of course, is a strong statement, but is it not strictly justified by the holding in this case? By the law under discussion a citizen owning shares in a railroad located entirely in Georgia is required to pay the regular tax on every share in the corporation if he is owner, and of course the amount might be anything supposable, while a citizen owning a like amount in value of shares of another Georgia railroad extending fifty yards in the State of Alabama, and paying fifty dollars tax thereon, is wholly exempt from taxation!

If the capital stock and property of a corporation is a distinct and separate ownership and property from that of shares owned by an individual, and if the situs of any portion of the corporate property in the State justifies the exemption of shares of individuals therein from taxation, while other shares are taxed, what prevents, under this rule, the taxing power from classifying for exemption and taxation on any basis whatever catching its fancy, though wholly disconnected from any distinction "in the nature of things and irrespective of the definitive legislation," putting the subjects in different classes. We see nothing in such case to limit the power of classification to inflict injustice. On the other hand, if capital stock and corporate property are the same as the individual property in shares, the latter are beyond the power of taxation so far as shares in foreign corporations are concerned, since the capital stock adheres to the domicil of the corporation.

Bradley v. Bander, 36 Ohio St., 28;
R. R. Co. v. Penn., 15 Wall., 300;
7 Notes U. S. Reps., 892.

We accept the proposition that the situs of shares is with the domicil of the owner in domestic or foreign corporations, whether it is by fiction or not in either case, or both cases, is wholly immaterial *for all purposes* of taxation. In all cases though the property is called a chose in action, in its essential nature it has reference to tangible personal property, since every chose or thing in action by being reduced to possession, merely loses its distinction as to being out of possession without any change of its essential nature. So far as the right of taxation is concerned, the chose, whether *in possession* or *in action* is the same, and each is taxable at its situs precisely as if it were bodily present thereat; and, as it would clearly be invidious and unjust to look to the mere previous history of tangible property involving whence and how it came there, to classify it for taxation, on the mere idea that the taxing power may look behind net value, so it cannot be less offensive to the ideas of justice prescribed by the Constitution, to classify, for discriminating taxation, choses in action *merely on the basis of their history*, on the idea that the taxing power may look behind net values. Whether or not a share of stock of a given net or market value present at a given situs for taxation, came thither by one mode or another, or was derived one way or another, or relates to a railroad built with rails of one weight or another, or a road wholly in Georgia or one partly in Georgia and partly in Alabama, are all questions which go behind its net value, and no doubt they may be of some interest in some investigations, bnt they touch not any questions justifying classification of shares differing merely in these respects so as to tax some and not others.

But we submit that the effect of the law under the discussion makes just such distinctions and no others.

There is an undoubted right to look behind net values for purposes of classification for taxation, that is, the taxing power can and should know everything pertinent to the subject of taxation, but in looking back and in using its knowledge, it can only notice for classification for taxation such matters as show that "in the nature of things, and irrespective of the (proposed) definitive legislation, they (the things proposed to be classified) belong to different classes."

Pacific Express Co. v. Seibert, 142 U. S., 339.

And such we insist cannot be settled to be the case as to shares that differ only in the fact that one has relation to a road wholly without the State while the other relates to a road extending into the State, or which has *some* property in the State. That must be merely a matter of history, genealogy or pedigree, no more affecting the inherent quality of the things present for taxation than would the most idle question wholly disconnected with the articles under investigation for classification.

If the shares are wholly distinct subjects and property interests from the corporate capital stock and property, then the fact that one of the corporations has *some* property in the State while the other has none, is wholly beside the point, whether the one share may be taxed, and the other exempted, when the shares are alike in every other respect.

In such case we submit that substantial constitutional justice is not meted out by a law that makes the one share support the government while the other is exempt.

On the other hand, if shares and capital stock are identical, so that a tax on one is a tax on the other, then

shares must have the situs of the corporate domicil, which would make the tax in this case unconstitutional.

But it is conceded that shares may be taxed at the domicil of the owner, because they are separate and distinct from corporate property and stock. The claiming and allowance of this, however, at once renders untenable the position, that a tax on *some* property of a corporation (that is on different property of a different person) will justify for taxation the diverse classification of other property of other owners, belonging, however, as to every *essential feature*, to the identical class of moneyed capital; one, as taxable; the other, as exempt.

II.

IT WOULD NOT BE COMPETENT FOR THE TAXING POWER TO EXEMPT SHARES IN DOMESTIC CORPORATIONS PAYING TAXES ON ALL THEIR CAPITAL STOCK, AND TO TAX SHARES IN FOREIGN CORPORATIONS HAVING NO PROPERTY IN THE STATE.

To deduce the principle involved in this proposition let us take an illustration.

Take a corporation situated in county A of Alabama, and take two citizens, B. and C., residing in a different county from that in which the corporation has its domicil. The capital stock of the corporation is a million of dollars, it is assessed on it and pays the taxes thereon at its domicil. Its stock is par and is offered for sale on the exchange.

The stock of a foreign corporation of same amount and value, is also offered for sale on the same exchange. Now the two citizens B and C each have $1,000,000.00 on deposit at their domicil to invest, and B buys the stock of the domestic corporation, while C invests in the stock of the foreign corporation, and settle down for

life to enjoy their respective dividends, which we may suppose to be six per centum.

The corporations are of the same character in all respects except location, one being east and the other west of the State line. The law we will suppose to say:

"Corporations located in this State are taxed fifty cents on the hundred dollars of their capital stock less the value of property, part of its capital stock, otherwise taxed.

Shares in foreign corporations are taxed fifty cents on the hundred dollars of their value; shares in domestic corporations are exempt."

Before the investment of B and C in shares, they paid equally, we will say, all the expenses of their city or county, and they invested the same amounts in the same kind of moneyed capital as above supposed.

After this investment the officials insist that C shall pay the county expenses and a large State tax on his investment, while B pays not a dollar, yet receives a like income with C from his investment; and the Supreme Court of Alabama holds that the contention is sound and meets the ends of "substantial justice."

The question is, can this court approve such a ruling, or, rather, will it adhere to such a decision?

Let us leave sentiment out of the way, though it is difficult to assent to the proposition that of two citizens of the same town, of the same income from the same class of property, one should, under any circumstances, be made to bear all the public burdens, and the other none. The simple question is, does the law of the land tolerate such a condition?

Now, the capital stock of a corporation is the same as the shares, or it is not. If it is the same, then it is

perfectly right that B should be exempt from taxes *at his residence*, because he has no property there, all of it being situated in the County A, at the domicil of the corporation.

But to get B's property away from his residence, the principle is established that takes C's property out of the State, by attaching it to the domicil of the corporation in whose stock he has invested. It is evident on this theory, that while B may be exempt, C cannot be taxed, for the taxing power does not extend to property not in fact or by fiction, within the jurisdiction.

Railroad Co. v. Pennsylvania, 15 Wall. 300;
7 Notes U. S. Reps. 892.

Now, suppose that shares and capital stock are different property rights, and thus different subjects of taxation. In such case, while C can make no objection to the law taxing his shares, on the idea that his property is not at his domicil, he can say that B has as much of the identical kind of property present at his residence yielding the same income, and he is under the like duty to pay taxes, and that the two properties must be taxed alike, or not at all. And we do not see that any answer can be made to this suggestion, if C is entitled to the equal protection of the law with B, which no one will deny.

It makes no difference which dilemma is taken. By the one, the State has no right at all to tax C's shares; by the other it has no right to tax C's shares and exempt B's shares.

As this court is thoroughly committed to the theory that individual ownership of shares is distinct from corporate ownership of stock and property, Bradley v. The People, 4 Wall., 459; Van Allen v. The Assessors,

3 Wall., 593; we will further briefly consider the propriety, under that idea, of taxing the shares of B and C alike, or not at all.

The case for consideratton is that of two citizens possessed of the same amount and value of the same kind of moneyed capital (shares) present at the same situs, with no difference in the world, except that one holds in a domestic and the other in a foreign corporation.

This court says in this case:

"When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock it may take into account that the property and franchise of the corporation are untaxed on the same ground that it might do the same thing with a domestic corporation. There is no rule that the State cannot look behind the present net values of different stocks. See American Refining Co. v. Louisiana, 179 U. S., 89."

We respectfully submit that in the above quotation is the fault of the decision.

In the first place, we do not come to consider *corporations*, formed at home or abroad, when the question is one of the right to tax, and the quantum of the tax to be put on, the *separate property* of a citizen. The class of the property being known, by looking at, and knowing and appreciating every inherent distinction authorizing discriminations by classes for taxation, the only question we submit before the Legislature is, whether such *class* shall be taxed, and if yea, at what rate? And the Su-

preme Court of Alabama, by a very able judge, stated in State Bank v. Board of Revenue, 91 Ala., p. 223, the considerations which must govern:

"What we do decide is, that whenever the Legislature levies a tax on property, the rate must be *in exact proportion to the value of such property;* and that if a tax is imposed on any species of property, *all property belonging to that species of property* must be taxed at the same rate. We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

Now if the shares belong to the same moneyed class and species of property inherently and by every natural attribute, and are present for taxation at the same place, and are of the same market value, and if they are separate and distinct property and subjects of taxation from corporate property, we do not see how there is any question of antecedents or history, or as to the present condition or situs of the corporation that can enter into, and influence classification for taxation on values for revenue only.

The share being separate property, belonging to a different person, having as it may a different domicil, and being taxable irrespective of corporate investments, all of which may be in non-taxable securities, it seems that all reference to the corporation is wholly irrelevant, on any question of taxing shares.

In the next place, it appears to be a novel and unsound proposition, that in taxing values of an *individual's* property, the taxing power may take into consideration that there is *other property not belonging to this individual*

which is beyond the jurisdiction and which, therefore, cannot be taxed. We know of no case or principle authorizing any such consideration for the purpose of inducing discrimination against properties of "the same species." The taxing power can only look to the persons and property under its jurisdiction and subject to its power, and as the citizen who invests in the shares of foreign corporations retains his property after investment as much within the power and jurisdiction of the State as was the case before investment, it seems that the fact that he has thus invested in foreign shares, so far as his rights and duties and those of the State are concerned as to taxation, is wholly irrelevant on any question of discrimination.

The Court further says that in this looking back behind net values in the case of shares in foreign corporations, if the Legislature concludes to tax shares, "it may take into account that the property and franchise of the corporation are untaxed on the same ground that it may do the same thing with a domestic corporation." And it cites as authority the case of American Refining Co. v. Louisiana, 179 U. S., 89. The case cited is a very proper decision, but it gives no color to the proposition for which it is cited. The tax in that case was not on values, but on a franchise or business, and the question was simply whether a sugar planter was a manufacturer or in the business of refining sugar, because he prepared his own product for market. The court held that his refining was a mere *incident* to his business of growing cane, and that he did not come in the definitive classification of "Refiners," all of this though, on account of natural and inherent differences between his case and that of those refining the production of others, precisely as in the case of Seibert, in 142 U. S., 339, the Railroad Company using its own transportation on its

own road was not an Express Company in the meaning of the tax law. Of course, we admit that the taxing power may be moved to exempt property from taxation from any motive. But this is not a case of exemption but of taxation. And we must admit that the taxing power may be legitimately moved by any consideration or motive whatever, to put a tax on property and persons within its jurisdiction. But this is not a case in which is called in question the power to tax.

The simple question is, whether in exercising an acknowledged right to tax a given *species* of property on values, the power must be exercised justly, that is, constitutionally, that is, in the language of the Supreme Court of Alabama, "if the tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate." And, of course, the fact that a corporation with its property is in one jurisdiction or another has nothing to do with altering the species of property of the shares of individuals therein, under the settled theory of this court that corporate property and capital stock and individual ownership of shares are separate and distinct property rights.

The court further says, referring to taxing shares in foreign roads while exempting shares in domestic roads and such foreign roads as pay some taxes to the State on property therein:

"The State of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purposes of its laws the property is not taxed at all. It is said that the State may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The State does nothing of the kind. It adheres throughout to the

fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the State's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a State, and the property of the corporation outside."

This position of the court, or rather the conclusion drawn from the statement, it is respectfully submitted, is indefensible.

It is admitted, for it is the basis of the contention in this case, that shares may be within the State while the capital stock and corporate property are foreign. But this is because, as has been repeatedly decided by this court, the shares are separate and distinct species of property and subjects of taxation from capital stock and other corporate property, and that they adhere to the domicil of the owner, while the capital stock has the domicil of the corporation, and the other corporate property which has a tangible form has its situs for taxation where it is actually situated. Therefore, it follows that when a citizen sells his real estate and invests the proceeds in foreign stocks, his investment is just as much within the jurisdiction and power of the State as previous to the sale of the land. While his investment was in land, he had the guarantee of the State and Federal Constitution that his land would be taxed only and solely according to its *actual value* irrespective entirely of the reason or cause of such value, and that the land of other citizens should be taxed on their value, irrespective of the causes of such value, according to the same ratio. To say, then, that the taxing power may exempt the one

and tax the other, or discriminate even partially between two owners of lands of equal values, because the value of one results from property or causes beyond the jurisdiction of the State, is wholly beyond our conception.

To illustrate it in a manner which is allowable, let us suppose two tracts of land in a state in which the value depends entirely upon irrigation. One tract is irrigated by water works within the jurisdiction of the State, paying taxes on its value.

The other tract is of the same value, and is in the same county, but is irrigated from the "White" instead of the "Blue Nile," and by means of water works located beyond the State line.

Here, now, is a perfect illustration of the principle established by the decision in this case. Under the holding of the court, the taxing power could exempt the land of the citizen watered from the "Blue Nile" because the water works (or "property") giving value to the land are taxed. And it could tax the land watered from the "White Nile" because the water-works or "property" giving it value are beyond the jurisdiction and in New Mexico instead of Arizona, which we will suppose to be the venue of the taxing power.

Surely the court could not intend such a result, and yet is it not the precise decision made in this case?

After classification, it is values only that the State can look at when taxing property *as such*. We are not dealing with the case of franchises or that of police regulations. When property is proposed to be taxed, it is of course to be classed, so as to receive its ratio of the proposed public burden of taxation.

Classification, however, is made, and must be made,

by reference to inherent qualities of the things classified, putting them into different lists or kinds of property, as in the cases of Seibert in 142 U. S., and American Refining Co. in 179 U. S. The classification being made, which in this case must be the same as to two shares of stocks in railroads which themselves differ only in the respect that one extends fifty feet within the taxing district, while the other stops at the line, values are next considered, and these are merely the "vendible" qualities of the article, which the great public fixes on considering and viewing everything calculated to add to, or detract from worth as an investment and article of useful property.

And it appears quite beyond reason to say that two articles of the same class of moneyed capital of equal value, in the same situs for taxation and the result of a mere change of investment of the same amount of other property into the new form, could be classified differently for exemption and taxation because the value of the one results from other property, belonging to other persons, situated within the taxing district, while the cause of value to the other is from other property belonging to other persons beyond the taxing district.

The Legislature, it appears, has nothing to do with the causation, or the *venue* of the causation, of values when it comes to make discriminating laws. And there is, it seems, not the slightest natural equity in the idea suggested that there should be any discrimination in such cases, even if the constitutional objections left the matter to a mere wise discretion of the State. The taxing power deals only with its own anatomy. The property and persons within its limits constitute its body and resources. Its wants must be supplied by its own energies; by checking on its own capital. A and B are

atoms of its body, though they are citizens having a qualified separate existence. It cannot be denied that, if there is such a thing as natural equity, the two citizens receiving equal benefits from the general government, and having equal and like values of property within its jurisdiction, should bear equally the public burdens.

Causation of values, whatever they may be, leave a *residuum*, and this residuum only, is the subject of the taxation of *shares*. And if the two citizens have a like residuum of the same class of moneyed capital, what equity can there be to discriminate between them on account of the causation of value in either case.

The case of Travelers Ins. Co. v. Connecticut, 185 U. S., 364, in principle, seems to settle this case. It is true in that case the tax was levied on the shares of a non-resident in a domestic corporation, on the idea that shares may by legislation be attached for taxation to the domicil of the corporation. But it makes no difference as to the law of discrimination whether the owner is a citizen or not of the taxing state, or the share in a domestic or foreign corporation. For the tax in each case is levied on property present in the taxing jurisdiction, and the "apparent discrimination" in the case of the Travellers' Insurance Co., *supra*, was founded on the non-residence of the *owner*, while in the case at bar the "alleged discrimination" is founded on the non-residence of a *third party*, to-wit: the corporation issuing the stock which is the subject of taxation. The principle involved in the two cases is thus identical, only the phase of discrimination in the case at bar is stronger than in the case in 185 U. S., *supra*. There can be no doubt that the law protects citizens of a state from discrimination by the Legislature of the State of their resi-

dence, just as much as it protects citizens of other states from such discrimination.

The court, in the case in 185 U. S., then held that "apparently" there was an unjust discrimination between the tax on shares, when it was shown that one share was taxed for state purposes while the other was exempt, which is the case here. But the court went further and said that "this apparent discrimination" disappeared on a closer examination of the system, which exempted the non-resident from local municipal taxation and put such taxes altogether on the resident, and that though they might be unequal they were not necessarily so, and in fact might be to the advantage of the non-resident.

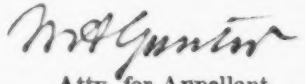
But in this case the law is necessarily unequal and discriminating. There is a tax on the share in foreign corporations for all state and county purposes, and there is no tax whatever on the share in domestic railroads having any property in the State.

The fact whether the railroads in which the shares are held have their property in one jurisdiction or another is a matter of no consequence, so far as the shares are concerned. The State, then, taxes the owner of shares in foreign railroads and exempts shares in domestic railroads and foreign roads paying some taxes to the State; that is, because a *third party* does or does not pay taxes to the State, citizens are to be discriminated against as to their own property.

That is to say, if A buys an annuity in a local corporation, and B buys one in a New York corporation, the State may tax the one and exempt the other, be-

cause the corporate property of the one company is situated in New York and the other in Alabama.

We thus think it is evident that the law in this case is utterly unconstitutional. And as the question involved is of great importance to the whole people of the United States, and no delay is asked in the collection by the State of the tax, the same having been already collected on execution, it is respectfully submiteed that a rehearing should be granted.



Atty. for Appellant.

No. 203, 158

Brief of Wiley for D. C.

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 165.

LOUISA Y. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TOLLIVER, DECEASED, Plaintiff in Error,

vs.

THE STATE OF ALABAMA, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Argument of A. A. Wiley, Gordon Macdonald and John D. McNeel, for Defendant in Error.

18560

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 403.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED, Plaintiff in Error,

v.

THE STATE OF ALABAMA, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Argument of A. A. Wiley, Gordon Macdonald and John D. McNeel, for Defendant in Error.

This case involves the assessment of shares of stock in foreign corporations against resident owners. The only issue raised by the assignment of errors is that said shares of stock in foreign corporations should not be assessed for taxation, because it is said no similar taxes are imposed upon the shares of stock in like domestic corporations doing business in the State of Alabama. And it is contended that the laws imposing taxation

upon shares of stock in a foreign corporation are illegal and void under the XIV Amendment to the Constitution of the United States, which guarantees the equal protection of the law.

The assessments in this case were made under the revenue laws of the State of Alabama as contained in the Codes of 1886 and 1896, respectively. The particular sections of said Codes which are necessary for the consideration of this case are as follows:

"The following property and persons shall be exempt from taxation: 8. The shares of the capital stock of any company or corporation, which is required to list its property for taxation in this State, shall not be assessed against the shareholders of such company or corporation."

Code of 1886, Sec. 451.

"Every share of any corporation organized under the laws of this state, or any other state, or of the United States, (other than railroad, telegraph, express and sleeping car companies, building and loan associations, and banks and banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in this state, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation.

Sec. 3911 of Code of 1896, Subd. 9.

This same subdivision proceeds to describe a method for assessing the shares, and also the corporate property, and for deducting the value of the corporate property from the value of the shares, so as to make the excess of values only taxable.

"All other property, real and personal, not otherwise specified herein, etc."

Sec. 3911 of Code of 1896, Subd. 14.

This latter, in which is set forth other subjects of taxation, is a general clause appearing in both Codes.

The section of the Code of 1886 above set out should be construed to exempt from taxation the shares of stock in only those corporations that list all or practically all their property for taxation in this state. Exemptions are contrary to the policy of the law, and so must be expressed in clear and unambiguous language. Had it been intended to exempt from taxation shares of stock in corporations that list any, or some, of their property for taxation in this state, it would have been so clearly expressed as not to be open to doubt. For this, we have the authority of this court as laid down in Sturges v. Carter, 114 U. S., 511. That case was appealed from the State of Ohio and involved the construction of a statute which exempted from taxation, as against the individual owners, shares of stock in corporations that list their property for taxation in that state. This court there said, "The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the state.—Jones v. Davis, 35 Ohio St., 474. This clearly means those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio. If the Legislature had intended to allow an exemption in such a case, it could and would have expressed that purpose by words not admitting of a doubt. As the shares of the plaintiff in error in the Western Union Telegraph Company were not only not expressly, but not even by fair implication, exempted

from taxation, we are of the opinion that the tax complained of was authorized by law."

The evident intent and purpose, then, of the Legislature was to exempt from taxation shares of stock in only those corporations that list all their property for taxation in this state. These were exempted for that the value of the shares of stock in such corporations are indirectly diminished by taxation of the corporate property. But, it is said that the exemption of such shares of stock in such corporations, and the taxation of shares of stock in foreign corporations, is an invidious discrimination and in violation of the XIV Amendment of the Constitution of the United States. We are told that here we have people living in the same taxing district, one owning shares of stock in a foreign corporation, the other owning shares of stock in a domestic corporation, and that, under such circumstances, such shares of stock must be taxed alike, for that their positions, as regards the taxing laws of the state, are identical; that shares of stock, be they in a domestic or a foreign corporation, represent a certain value to the owners and should be taxed in proportion to that value. But, the property and franchises of railroads doing business in this state are elsewhere and otherwise taxed, and said taxation indirectly affects the value of the shares of stock. The same cannot be said of shares of stock in a foreign corporation, as its property and franchises are not subject to taxation by this state, and if such property is taxed at all it is by some other law over which this state has and cannot have any control. This state knows that the property and franchises of corporations doing business in this state are taxed and properly, but it knows nothing of the taxation of foreign corporations and consequently cannot be affected by the action of any foreign state.

Dwight v. Boston, 12 Allen, 316.

By taxing the property and franchises of corporations doing business in this state, the value of the shares of stock in said corporations are indirectly diminished. Should shares of stock in foreign corporations be exempted from taxation, as is contended for by plaintiff in error, their value would not be, directly nor indirectly, affected by the laws of this state. This, then, would be to discriminate against holders of shares in domestic corporations, and would be an invitation to the citizens of this state to invest their money in shares of stock in foreign corporations, to avoid the just claims of the state for taxation. It is true the shares of stock are identical in character, they are found in the same district, if you please, but the value of one is indirectly affected by the taxing laws of this state, and the two kinds of shares can be placed on equality, so far as the taxing laws of this state are concerned, only by directly taxing the shares of stock in foreign corporations and exempting from taxation shares of stock in corporations that list their property for taxation in this state.

In Pacific Express Company v. Seibert, 142 U. S., 339, it was contended that the Legislature arbitrarily defined what constituted an Express Company and imposed a tax on its business, while the same kind of business was permitted to be done by any person or company not included in the class defined without being taxed. The class was restricted "to persons or corporations that carry on a business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the state," while a person or corporation who owned its own means of transportation might engage in the same business without being taxed. This court in that case said: "The legislation in question cannot be considered as invidiously discriminating

against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between companies defined by this act and railroad or steamboat companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock and other tangible property, as well as upon their franchise; and steamboat companies likewise pay a tax upon their tangible property." So here, we contend, there is an essential difference, so far as the purposes of taxation are concerned, between shares of stock in a corporation that pays taxes on its tangible property and shares of stock in corporations that pay no tax on their corporate property.

In Louisiana there is a statute exempting from taxation sugar refiners that limit their refining to the products of their own farm; all other refiners being taxed on their machinery. This was thought to be an unjust discrimination in favor of the small refiners and an infringement of the XIV Amendment. But this court held said act not in violation of said XIV Amendment. The court there said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the law to the less favored classes. But from time out of mind it has been the policy of this

government not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their produce on the market.

American Sugar Refining Company v. State of Louisiana, 179 U. S., 89.

And if there was an exemption here it might well be sustained on the theory that the state favored investments in public utilities doing business within her borders and thus contributing to her wealth. Such exemptions have been repeatedly sustained; they are not unreasonable.

M. & G. R. R. Co. v. Peebles, 47 Ala., 317;
S. & N. R. R. Co. v. Morris, 65 Ala., 193;
State R. R. v. Bd. of Rev., 91 Ala., 217.

In the case in 179 U. S. cited we have identical classes of property—one taxed, the other exempted from taxation. The *history* of the refineries was looked to for the discrimination, which was upheld. Yet, we have counsel *contra* citing and commenting on this case and elsewhere in his brief insisting that "In taxing identical classes of property, value can only be viewed, and the ratio of taxation must be the same on the valuation." And again counsel say: "Shares in railroads belong to the same class—they may be supposed identical in value—and both located in the same taxing district, by being attached to the domicile of the owner. How, then, can the legislature look into the history of the shares and class shares in foreign corporations having no property in this state for taxation and exempt shares in domestic railroads? Such a distinction has no relation to the object of the statute." So, too, the sugar refineries belong to the same class—they may be supposed identical in value—and both located in the same taxing district. How,

then, can the legislature look into the history of the cane used in said refineries and class refineries that are owned by non-producers for taxation and exempt refineries owned by producers? This is a distinction without a difference.

There is nothing in the XIV Amendment to forbid the classification of property for the purposes of taxation. The rule of equality only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Barbier v. Connally, 113 U. S., 29;
Kentucky R. R. Cases, 115 U. S., 321;
Bell's Gap R. Co. v. Penn., 134 U. S., 232;
Missouri Pacific R. Co. v. Mackey, 127 U. S., 205;
Missouri v. Lewis, 101 U. S., 22;
The Pacific Express Co. v. Seibert, 142 U. S., 339;
Giozza v. Tierman, 148 U. S., 657.

The only requirement is that such classification cannot be made arbitrarily.

It is said that "the accidents or incidents of corporation locality or the locality of corporation property do not afford any just rule of classification for discrimination in taxation." This is quite true, but unfortunately for the plaintiff in error it has no application to the facts of this case. The classification that is under consideration is not based upon location of corporate property. The two classes are as follows: Shares of stock in corporations that list (*all* or *substantially* all) their property for taxation in this state; and shares of stock in corporations that do not so list their property. It is not an arbitrary and invidious discrimination, but a

classification based upon an essential difference between said shares of stock as affected by the taxing laws of the state. We find, too, that a majority of the states have similar provisions and it is apparently the generally accepted theory of taxation.

The assessments that are being contested were, with the exception of the last year, made under the law as contained in the Code of 1886. The assessment for the last year was made under the Code of 1896. Whatever may be the opinion of the court as to the validity of the assessments made under the Code of 1886, the validity of the assessment under the Code of 1896 can not be affected thereby. For, as we shall hope to show, shares of stock in domestic corporations are not exempt from taxation under the Code of 1896, but are taxed just as are shares of stock in foreign corporations. Section 3911, subd. 9 of the Code of 1896, it is contended, exempts shares of stock in certain corporations from taxation—among which are railroad corporations. We might here say that the assessments in this case were made upon shares of stock in a foreign railroad corporation. That subd. 9 is as follows: "Every share of any corporation organized under the laws of this state, or of any other state, or of the United States, (other than railroad, telegraph, express and sleeping car companies, building and loan associations, and banks and banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in the state, and to be assessed at its actual market value to the person in whose name such share stands on the books of the corporation and not to the corporation." Said subdivision proceeds to set out a mode for assessing said shares and also the corporate property, and for deducting the value of the corporation's taxable property from the value of the shares, so as to make the

shares taxable only upon the excess of values. In this case before the Supreme Court of Alabama both sides contended that such bracketed exception was an exemption of shares of stock in said corporations *doing business in this state*, but the plaintiff in error further contended that the exemption also applied to shares of stock in said corporations—foreign as well as domestic—and the question submitted to the Supreme Court was whether or not shares of stock in such foreign corporations were exempted from taxation under said subdivision. The court held that exemption from taxation of shares of stock in a foreign corporation was not made by said section. The question of whether or not shares in such named domestic corporations were exempted, was not before the court and has never been presented and properly passed upon by the Supreme Court of this State.

To our minds it is clearly apparent that there is nothing in said subdivision that should be construed as an exemption of shares of stock of any kind whatsoever from taxation. If said subdivision does not in clear and explicit terms make an exemption of certain property from taxation, then it is the duty of the court to so construe it as to preclude an exemption. Section 3911 of the Code of 1896 sets out the various properties that shall be taxed and the modes of taxation of the different classes of property. Subdivision 9 merely sets forth the mode of taxing shares of stock in every corporation other than those included within the brackets. These latter are of course exempted from the peculiar manner of taxation as is set forth in this subdivision, and is an exemption to no further extent. In subdivision 8 of said section 3911, is set forth the particular mode of taxing shares of stock in banks and banking associations. Yet we find banks and banking associations included in the bracketed exception of subdivision 9.

Then, too, we find that shares of stock in building and loan associations are elsewhere specially taxed. Why, then, do we find these included in the bracketed exception of subdivision 9 if said bracketed exception is an exemption from taxation? Did the legislature, at the same time, tax and exempt from taxation certain classes of property? As aforesaid, the bracketed exception is merely an exemption from that particular mode of assessment as is set forth in said subdivision 9, and is not an exemption from taxation. This interpretation is by far the most reasonable, especially in view of the fact that the Code of 1886 had a subdivision, under the head of exemptions, which specially exempted from taxation shares in corporations whose property was listed for taxation in this state; but said subdivision is omitted from the Code of 1896. We have then two possible interpretations of subdivision 9 of section 3911. One reasonable and not in conflict with the general policy of the law; the other strained and directly opposed to general policy and therefore not to be favored. There can be no doubt which interpretation the court will adopt. As, then, there are no exemptions of shares of stock under the Code of 1896, the assessment of shares of stock in foreign corporations is not violative of any constitutional principle. If, as a matter of fact, shares of stock in domestic corporations are not assessed for purposes of taxation, the fault is not in the law but in the failure of the tax assessors properly to do their duties. And so we contend that the assessment under the Code of 1896 was valid, irrespective of the validity of the assessment for the years prior thereto.

The fact that the Code of 1886, Sec. 451, Subd. 8, exempts shares of stock in corporations required to list their property in this state is *not* an invidious discrimination against shares of stock in foreign corporations,

but such an exemption is perfectly within the power of the state.

This case presents a very grave question to the State of Alabama and to every other State in the Union. It is the unquestioned law that shares of stock have their situs at the domicil of the owner. If it be held that a resident of a state may invest all of his money in shares of stock or in corporations of another state, or in a foreign country, that he may escape taxation on his shares of stock there, because, by fiction of law this situs is at his domicil, then every man will so invest his money and the state of his domicil will be deprived of all revenue except from land or fixed property which cannot be moved.

We submit that the decision of the Supreme Court of Alabama is in consonance with common justice; is supported by the overwhelming weight of authority, and should be affirmed.

A. A. WILEY,
GORDON MACDONALD,
JNO. D. MCNEEL,
Counsel for Defendant in Error.

COPY.

[illegible] Court of the United States,

[illegible] TERM, 1921.

No. [illegible] 538

LOUISA V. KIDD, as Executrix of the Will of H. B. Tolson, deceased,

Plaintiff in Error,

against

THE STATE OF ALABAMA,

Defendant in Error.

[illegible] of Francis G. Caffey and John C. Hendrickson, of Counsel for Defendant in Error.

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 403.

LOUISA V. KIDD, as Executrix of the Will of H. B. Tulane, deceased,
Plaintiff in Error,

AGAINST

THE STATE OF ALABAMA,
Defendant in Error.

Brief of Francis G. Caffey and John C. Breckinridge, of Counsel for Defendant in Error.

STATEMENT OF THE CASE.

Louisa V. Kidd is the executrix of the will of H. B. Tulane, who died a resident of Elmore County, Alabama, in October, 1897 (Record, p. 9). In 1898, the tax assessor of that county, in accordance with Section 3947 of the Code of 1896 of Alabama, assessed to plaintiff in error, as having escaped taxation for the

years 1893 to 1897 inclusive, certain shares of stock in corporations not organized under the laws of Alabama, and not having any property or doing any business in that State, and, in accordance with Section 3981 of the Code, returned the assessment to the Court of County Commissioners (pp. 2, 3, 11, 12).

The Court of County Commissioners upheld the assessment, but, on appeal to the Circuit Court of Elmore County, it was vacated (pp. 1, 2). Thereupon an appeal was sued out from the judgment of the Circuit Court to the Supreme Court of Alabama, wherein the cause was reversed *(State vs. Kidd*, 125 Ala., 413).

On a new trial in the Circuit Court defendant filed two pleas, numbered 1 and 3, in which she set up that the statutes under which these shares of stock were held liable to taxation were in violation of the 14th amendment to the Constitution of the United States (pp. 5, 6). Demurrers to these pleas were sustained (pp. 7, 8). The cause then being submitted on an agreed statement of facts, the Court charged the jury to find for the plaintiff, and declined a request of defendant to charge that there could be no recovery upon the claim for taxes on shares of foreign railroad companies (pp. 9, 10), and judgment was rendered for the plaintiff (p. 8).

On appeal to the Supreme Court of Alabama, the judgment of the lower Court was, on the 29th day of June, 1901, affirmed on the authority of the decision on the former appeal (pp. 1, 15). Thereupon a writ of error to the Supreme Court of Alabama was sued out in this Court.

Four errors of the trial Court are assigned (pp. 17-8) and insisted on in brief of counsel for plaintiff in error, (pp. 2-4)—namely, the sustaining of demurrers to the

first and third pleas, the giving of the instruction to the jury asked by plaintiff and the refusal of the instruction asked by defendant.

ARGUMENT.

FIRST POINT.

The sections of both Alabama codes attacked by plaintiff in error must be declared unconstitutional before the judgment of the Supreme Court of Alabama can be reversed.

I. The rule in Alabama is that a plea professing to do so must answer the whole complaint; if any part of the complaint is unanswered, the plea is bad.

Deshler vs. Hodges, 3 Ala., 509.
Standifer vs. White, 9 Ala., 527.
Mills vs. Stewart, 12 Ala., 90.
White vs. Yarbrough, 16 Ala., 109.
Bryan vs. Wilson, 27 Ala., 208.
Wittick vs. Traun, 27 Ala., 562.
Cox vs. Columbus, 91 Ala., 392.
Smith vs. Heineman, 118 Ala., 195.
Carter vs. Long, 125 Ala., 280.
City of Greenville vs. Greenville W. W. Co., 125 Ala., 625.
4 Mayfield's Digest (Alabama), 469, Par. 604; 470, Par. 616-8.

The grounds of demurrer to the pleas (pp. 7, 8) do not include this objection by name, but are worded so that it can be considered to have been made in the trial court. Furthermore, the Supreme Court of Ala-

bama makes every presumption to uphold the ruling of a lower court sustaining a demurrer to a bad pleading, even to the extent of presuming, where no grounds appear in the record, that proper ones were assigned.

Hodge vs. Tufts, 115 Ala., 366, 374.
Southern Railway Co. vs. Guyton, 122 Ala., 231, 239.

The complaint sought a recovery of taxes assessed partly under the Code of 1886 and partly under the Code of 1896. This has been expressly decided by the Alabama Supreme Court.

State vs. Kidd, 125 Ala., 413, 420.

The pleas profess to answer the whole complaint (p. 5). Hence, *if the tax law contained in either code is free from the constitutional objection made, the demurrers to the pleas were properly sustained.*

II. So, also, if it be considered that the charge given or the charge refused (p. 10) raised the question of the constitutionality of these statutes, *neither charge is so framed that the ruling on it was erroneous unless the tax sections of both codes are unconstitutional.*

SECOND POINT.

The tax provisions of the Code of 1886, under which the taxes for the years 1893 to 1896 were assessed, do not deprive plaintiff in error of the equal protection of the laws.

I. *The provisions of the Code of 1886 material* to be considered are as follows :

Subdivision 2 of Section 450 defines "personal property" to include stocks. Section 453, after setting out a number of classes of property, provides in subdivision 13, "that all other property, real and personal, not otherwise specified herein," shall be subject to an annual tax of sixty cents on each hundred dollars in value.

To the same tax there is also subject, by subdivision 9 of Section 453, the capital stock of all domestic corporations in Alabama, except such portions of the capital stock as is invested in property otherwise taxed, which tax is to be paid by the corporation; but when the corporation pays the taxes levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation shall only be required to pay the taxes levied on its real and personal estate, unless its investments are otherwise taxed.

Section 478 provides that "The taxable property of every corporation, not otherwise regulated as to taxation by the laws of this State," shall be returned to the tax assessor, and if the corporation pays the tax on such property, "then no tax on the shares into which the capital stock of such corporation may be divided shall be demanded or collected of the holders thereof."

There is also levied, by subdivision 11 of Section 453, a tax on the roadbed, track and other property, real and personal, of railroads.

By subdivision 8, Section 451, it is provided that "the shares of the capital stock of any company or corporation which is required to list its property for taxation in this State shall not be assessed against the shareholders of such company or corporation."

Various corporations are required to list their prop-

erty for taxation in Alabama and among them railroad companies "whose track or roadbed, or any part thereof, is in this State," as appears by Sections 494 and 509.

These are the sections of the Code which were under consideration in the Supreme Court of Alabama.

State vs. Kidd, 125 Ala., 413.

II. *The sole attack* made upon them *by plaintiff in error is that she was deprived of the equal protection of the laws*, because owners of shares in domestic corporations and in foreign corporations doing business and owning property in Alabama were not also taxed on their shares. It is not denied that if the classification for taxation was lawful, there was no discrimination within the class to which plaintiff in error belonged. (See brief for plaintiff in error, pp, 1, 4, 7).

III. In the FIRST place, *the taxation of shares in foreign corporations doing no business and owning no property in the State and the exemption of shares in domestic corporations and in foreign corporations owning property and doing business in the State would not deprive of the equal protection of the laws.*

1. *The State has the right to discriminate* in forming classes for taxation, *provided* the basis of discrimination is *reasonable* in principle.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 92, and cases cited pp. 94–5.

Pacific Express Co. vs. Seibert, 142 U. S., 339, 350-355, and cases cited pp. 354–5.

Williams vs. Fears, 179 U. S., 270, 275–6.

Magoun vs. Illinois T. & S. Bank, 170 U. S., 283, 293.

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Bell's Gap R. R. vs. Pennsylvania, 134 U. S., 232, 237.
Home Insurance Co. vs. New York, 134 N. Y., 594, 606, 607.

In *Tullis vs. Lake Erie & W. R. R.*, 175 U. S., 348, 353, the Court approves another decision in which "it was said that the powers of the State to distinguish, select and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary."

The sole inhibition under the 14th amendment, as is in effect conceded by counsel for plaintiff in error in his brief (p. 7), is that the basis shall not be "arbitrary," "oppressive" or "capricious."

Gulf, &c., Ry. vs. Ellis, 165 U. S., 150, 155, and cases cited on brief of counsel for plaintiff in error, pp. 7, 11.

2. There is no fixed test of what basis of classification is reasonable. Each case must be considered for itself (*Bell's Gap R. Co. vs. Penn.*, 134 U. S., 237). *It is within the province of the State*, as a part of its public policy, *as an inducement to investment in shares of corporations organized or doing business and owning property within the State, to give an advantage to persons holding stock in such corporations.* A discrimination in favor of such persons, and against the holders of stock in corporations owning no property and doing no business in the State, would be reasonable in principle. The "conditions" and "circumstances" of the owners of stock in the two classes of corporations are different. One owns stock repre-

senting an interest in property which may be otherwise taxed and be of benefit to the citizens of the State; the other owns property which, unless taxed directly, cannot be reached at all and is of no benefit to the State or its citizens generally.

Pacific Express Co. vs. Seibert, 142 U. S., 352, 354.

The State may, therefore, with good reason, say to shareholders, who have the entire control of the corporation, if your corporation will organize or do business or own property within my boundaries, you will not be taxed on your shares of stock; but if you do not organize and do no business and own no property here, you will be taxed on your stock owned here.

Bell's Gap R. Co., vs. Pennsylvania, 134 U. S., 237.

Barbier vs. Connolly, 113 U. S., 27, 31, 32.

3. It is easy to conceive that *if the statutes of two States relieved from taxation shares in corporations owning no property and doing no business in the State, the citizens in each State might take stock only in corporations of this character, owning property and doing business exclusively in the other.* This would encourage investments outside the State, put property in intangible form, and, at least, be inconvenient and render taxation extremely difficuly of administration; and, unless the incorporation laws of the two States happened to be of equal attractiveness, there would be a tendency to increase in one and decrease in the other the amount of tangible property subject to taxation. In order to discourage this, if for no

other reason, the State would be justified in taxing all shares of this kind at the situs of the ownership.

4. Furthermore, *a law of this kind prevents escapes from taxation.* In order to exercise the sum total of its right to tax both the shares and the corporate property, which it undoubtedly possesses, it must be held that the State has the power to tax shares of corporations owning no property and doing no business within its limits. This is not denied. For aught that appears, the corporate property of the railroad corporations here involved may not be taxed at all, and none of the stock in them be owned, in the States in which they do business and own property. If the laws of those States tax only shares of stock and such stock is taxed at the situs of its ownership, if the contention of plaintiff in error is upheld, such shares would escape altogether any burden of taxation, either direct or indirect. The usual situs of taxation is the place of ownership.

Kirtland vs. Hotchkiss, 100 U. S., 491, 498–9.

State vs. Kidd, 125 Ala., 413, 420–1.

Such a result would be contrary to the generally prevailing policy of restricting exemptions from taxation *(Sturges vs. Carter*, 114 U. S., 521–2); and the adoption of a law which renders this impossible, as does the Alabama statute, may be said, on that ground, to be founded on a reasonable basis.

5. *The contention* of counsel for plaintiff in error that value is the sole basis of taxation, and

that all classification must be so made that equal values shall be equally taxed, flies in the face of repeated decisions of this court. In *Giozza vs. Tiernan*, 148 U. S., 657, 662, Mr. Chief-Justice FULLER says: "Nor in respect of taxation was the [14th] amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class."

Davidson vs. New Orleans, 96 U. S., 97, 105.

Bell's Gap R. R. vs. Pennsylvania, 134 U. S., 232, 237.

Pacific Express Co. vs. Seibert, 142 U. S., 339, 351.

Adams Express Co. vs. Ohio, 165 U. S., 194, 228.

Magoun vs. Illinois T. & S. Bank, 170 U. S., 283, 295.

Western Union T. Co. vs. Indiana, 165 U. S., 304, 309.

This contention forms the major premise of the entire brief of counsel for plaintiff in error (pp. 12–16, 18), and, if it is unsustained, the whole argument falls.

A tax system which has as its basis of classification of corporations for the purpose of taxation (1) the encouragement of the doing of corporate business

and owning corporate property within the State, (2) the discouragement of citizens of the State from investing exclusively in corporate enterprises carried on wholly in other States, and (3) a decrease of the liability of property to escape taxation, by offering an inducement to citizens to invest in property which is tangible in form and more easily discoverable by the tax assessor, is neither arbitrary, nor oppressive, nor capricious, but is founded upon reasons connected with the duties of citizens as taxpayers.

IV. In the SECOND place, the discrimination is reasonable, because *the effect of the statute, in operation, is to equalize the burden of taxation.*

1. While the contention of the plaintiff in error, that the State is without power to classify for taxation except on the basis of value of the property, is not well founded, it is true that *it is the general policy of the State to tax values equally* and to avoid double taxation so far as practicable.

State vs. Kidd, 125 Ala., 421.
1 Desty: Taxation, 199.

2. In accomplishing this, however, *the State looks only to its own tax laws* and regulates them by its own theory of fairness, and does not consider the laws of other States.

State vs. Kidd, 125 Ala., 413, 421, 422-3.
Bradley vs. Bauder, 36 Ohio St., 28, 36.
Dwight vs. Mayor, 12 Allen, 316, 322-3.

Bemis vs. Boston, 14 Allen, 366, 368.
Dryer vs. Osborne, 11 R. I., 321.
1 Desty: Taxation, 62–3.

3. As heretofore pointed out, *the Code of 1886 taxes directly the corporate property of domestic corporations and of foreign corporations owning property and doing business in the State*, and where stock in them is taxed, it is never more than on its excess in value above the value of the corporate property. While this tax on stock is required in some instances and authorized in others to be paid directly by the corporation, to avoid double taxation, if any part of the tax is paid by the shareholders, the corporation is to that extent relieved.

Code, Section 451 (8), 453 (8, 9), 478.

This has been declared to be the meaning of the foregoing sections.

State vs. Kidd, 125 Ala., 413, 421.
See, also, National Bank vs. Com., 9 Wall. 360–1.

The taxation on the excess in value of the capital stock above the tangible corporate property is not duplicate taxation, but a tax on the franchise.

Hamilton Co. vs. Massachusetts, 6 Wall., 632.
Cooley: Taxation, 2d Ed., 230.

4. Notwithstanding there is a clear distinction between the shares in a corporation and its capital stock, yet, for the purpose of taxation, so much are corporate property and stock identified that, in many States, it is held that *to tax a corporation*

on its property and its stockholders on their shares in the same jurisdiction is double taxation.

State vs. Kidd, 125 Ala., 422.
Gordon vs. Baltimore, 5 Gill., 231, 236.
Baltimore vs. B. & O. R. Co., 6 Gill,, 288.
American Bank vs. Mumford, 4 R. I., 478, 482–3.
Providence Inst. vs. Gardiner, 4 R. I., 484.
Cooley on Taxation, 228–9, and cases cited.
Burroughs on Taxation, Sec. 90.
See Farrington vs. Tennessee, 95 U. S., 679, 688.
Sturges vs. Carter, 114 U. S., 511, 521.

5. Hence, *in order for the State to* carry out its policy of avoiding double taxation, and at the same time *impose* as nearly as practicable *an equal burden of taxation* according to values, *it was necessary*, in Alabama, where this view is held, *to frame a statute such as the one here* under discussion. Discrimination in classification is necessary in order to insure equality (*Bell's Gap vs. Penn.*, 134 U. S., 237). If stock of foreign corporations held by citizens should bear any share in the support of the State, this statute "is the only mode in which the State can reach their shares for taxation" (*National Bank vs. Com.*, 9 Wall., 361). If the statute accomplishes this, the result, even though indirectly reached, is no more than what counsel for plaintiff in error seems so ardently to desire, viz., equality of burden; and surely it will not be denied that a classification for taxation, even though it is discriminating, which leads to this end is founded upon reasonable discrimination.

The Alabama law does not in fact unjustly discriminate between owners of stock in foreign corporations which own and those which do not own property in the State; it taxes all, by either direct or indirect method, once only, according to its value.

V. In the THIRD place, *even if* holders of stock in railroads owning property and doing business in the State were given an advantage, by exemption from taxation, over holders of stock in foreign railroads owning no property and doing no business in the State, and *the law on account of the discrimination were invalid, the defect would be in the exemption* of the first class and not in the taxation of the second. If the law were declared unconstitutional, it could only be in a proceeding to enforce, under subdivision 13 of Section 453, the collection of taxes from holders of shares of the first class of corporations. The vice would not be one of which the owner of foreign shares, which are taxed, could complain. Mr. Justice SHARPE (125 Ala., 423) makes this clear when he says that if there is anything in the suggestion of invalidity, "the infirmity lies in that part of the statute which allows the deduction, and not in that part which imposes the tax. * * * It does not follow that because a specially devised plan of taxation be inadequate or abortive that property to which it relates will escape taxation, for it may be reached and taxed under general provisions where they are adequate."

The shares in foreign corporations owning no property and doing no business in Alabama are indisputably subject to taxation there. If a discrimination has

been made, the only way to wipe it out is to hold that the part of the law exempting other persons owning property of the same class is invalid; it should not be by holding a perfectly general provision of law to be inapplicable to the plaintiff in error. This Court usually accepts the State Court's construction of a local statute. If Mr. Justice SHARPE'S construction quoted above is accepted, then plaintiff in error has suffered no injury and cannot complain that the exemption provision is invalid.

Shehane vs. Bailey, 110 Ala., 308.
Cooley: Cons. Lims., 6th Ed., 196.

THIRD POINT.

The tax provisions of the Code of 1896 under which the remaining taxes were assessed do not violate the Fourteenth Amendment.

I. *The material provisions of the Code of 1896* are as follows:

Sections 3906 (2), 3911 (12) and (14), 3964 and 3976 are substantially the same, except as to the rate of taxation, as Sections 450 (2), 453 (11) and (13), 494 and 509 of the Code of 1886. Section 478 and subdivision 8 of Section 451 of the Code of 1886 are entirely omitted. (See *Acts of Alabama* 1896-7, p. 1511; Code of 1896, Sec. 3907). And for subdivision 9 of Section 453 of the Code of 1886 there is substituted subdivision 9 of Section 3911.

By the latter it is provided that there shall be subject to taxation "every share of any corporation organized under the laws of this state, or any other state, or of the United States (other than railroad, telegraph, express and sleeping car companies, building and loan associations and banks or banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in this state, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation." The subdivision then further provides that the tax assessor shall ascertain the value of all the shares of the corporation and from it deduct the value of the real and personal property of the corporation, and by dividing the residue by the whole number of shares ascertain the value of each share for taxation; that the corporation shall pay this tax for the shareholders and have a lien therefor upon any interest which the shareholders may have in the property owned by the corporation. It is further provided that the corporation shall be taxed upon its real and personal property, and that if the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as assessed for taxation no tax shall be demanded on the shares.

The Alabama Court held that under this subdivision only those foreign corporations which have some property in the State are taxable.

State vs. Kidd, 125 Ala., 422.

II. Our associate counsel have fully argued the point that, under the Code of 1896, *the owners of*

shares of stock in foreign corporations owning property and doing business in Alabama are not exempted from taxation thereon. (See their brief, pp. 9–11). We shall not repeat that argument here.

Conceding the proposition to be established, then, on this ground alone, the argument of the plaintiff in error as to the taxes assessed under the Code of 1896 fails of its ground work, because the owners of shares of stock in all foreign corporations, whether or not owning property in the State, would be on the same footing.

Respectfully submitted,

FRANCIS G. CAFFEY,

JOHN C. BRECKINRIDGE,

Of Counsel for Defendant in Error.

Supreme Court of the United States.

No. 158.—October Term, 1902.

Louisa V. Kidd, as Executrix of the Will of H. B. Tulane, deceased, Plaintiff in Error, *vs.* The State of Alabama. } In error to the Supreme Court of the State of Alabama.

[February 23, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action for taxes brought by the State of Alabama against the executrix of the will of a citizen of Alabama. It appears on the record that the property in dispute is stock in railroads incorporated in other States than Alabama, and that the objection was taken seasonably by plea and by requests for instructions to the jury that the tax was unconstitutional under the Fourteenth Amendment, because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that State. Demurrers to the pleas were sustained, there was a verdict for the plaintiff and judgment, which latter was affirmed by the Supreme Court of the State without discussion, on the authority of its decision at an earlier stage, *State* v. *Kidd*, 125 Ala. 413, and the case is brought here by writ of error.

The statutes levying the tax in question are the Code of 1886, § 453, cl. 13, and the Code of 1896, § 3911, cl. 14. They are general clauses, which need not be set forth, as their effect is not disputed under the construction given to them by the Supreme Court of the State. The exemption by the Code of 1886 of stock in domestic railroads, and in others that list substantially all their property for taxation, (*Sturges* v. *Carter*, 114 U. S. 511, 522,) is not denied, and while it is denied by the defendant in error that there is a similar exemption by the Code of 1896, for the purposes of decision we shall assume, without examination, that it is granted. *State* v. *Kidd*, 125 Ala. 413, 422. On this assumption the argument for the plaintiff in error is that if foreign stock is treated for purposes of taxation as present by fiction in the domicil, it must be treated as present also for purposes of protection, that the tax is a tax on values, and that net values of similar articles must be treated alike. It is said that you cannot look further back.

If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem

to us to have more logical force, although we are far from implying that it would be unanswerable or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges* v. *Carter*, 114 U. S. 511; *Dwight* v. *Boster*, 12 Allen, 316; *Dyer* v. *Osborne*, 11 R. I. 321. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated, strikes us as wholly without force. We see nothing to prevent a State from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock it may take into account that the property and franchise of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the State cannot look behind the present net values of different stocks. See *American Refining Co.* v. *Louisiana*, 179 U. S. 89.

We say that the State in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41; *Dyer* v. *Osborne*, 11 R. I. 321, 327; Cooley, Taxation, 2d ed. 221, *n*. One aspect of the problem was touched in the case of *Blackstone* v. *Miller*, at the present term. The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all.

It is said that the State may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The State does nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the State's recognizing at the same time that the property of the

corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a State, and the property of the corporation outside it.

We need not repeat the commonplaces as to the large latitude allowed to the States for classification upon any reasonable basis. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, 352; *Gulf, Colorado & Santa Fé Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Nicol* v. *Ames*, 173 U. S. 509, 521; *Atchison, Topeka & Santa Fé Railroad Co.* v. *Matthews*, 174 U. S. 96; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89. What is reasonable is a question of practical details, into which fiction cannot enter.

Practically the law before us, in the broad aspect in which alone we are asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side the probable taxation by other States, which does not affect the State of Alabama's rights.

Judgment affirmed.

Justices HARLAN and WHITE dissented.

NOTE.—No. 157. *Kidd* v. *Alabama*. This case was to abide the result of the foregoing.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.